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IN THE

Supreme Court of the United States

October Term, 1959

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix

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WALKER, EVANS & COGSWELL CO.—Printers of Distinction Since 1822—CHARLESTON, S. C.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix

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The Petitioners pray that a writ of certiorari issue to review in the above cause (1) the decision of the United States Court of Appeals for the Fourth Circuit dated November 13, 1958, which affirmed in part and reversed in part the decree of the United States District Court for the Eastern District of South Carolina, dated October 17, 1957; (2) the decision of the United States Court of Appeals for the Fourth Circuit dated June 8, 1959, after rehearing, which set aside the Court's decision dated November 13, 1958, and remanded the cause to the United States District Court for the Eastern District of South Carolina; and (3) the decision of the United States Court of Appeals for the Fourth Circuit dated May 19, 1960

(rehearing denied July 1, 1960), which affirmed the decree of the District Court of the United States for the Eastern District of South Carolina, dated September 26, 1959.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of South Carolina dated October 17, 1957, is reported in 155 F. Supp. 359.

The opinion of the United States Court of Appeals for the Fourth Circuit dated November 13, 1958, is reported in 261 F. 2d 563. (Appendix, page 1a)

The opinion of the United States Court of Appeals for the Fourth Circuit dated June 8, 1959, is reported in 268 F. 2d 27. (12a)

The opinion of the District Court of the United States for the Eastern District of South Carolina dated September 26, 1959, is reported in 177 F. Supp. 76.

The opinion of the United States Court of Appeals for the Fourth Circuit dated May 19, 1960, is reported in 278 F. 2d 921. (15a)

The order of the United States Court of Appeals for the Fourth Circuit dated July 1, 1960, denying a petition for rehearing, is not officially reported but is set forth in full in the annexed appendix, page 22a.

JURISDICTION

The jurisdiction of this Court is invoked to review the decision of the United States Court of Appeals for the Fourth Circuit dated November 13, 1958, June 8, 1959, and May 19, 1960, upon authority of Title 28 of the United States Code, Sections 1254 (1), 1651 (a) and 2101 (c) and under Rule 19 (1) (b) of the rules of the Supreme Court; and particularly

on the grounds that the said Court of Appeals has rendered decisions in conflict with decisions of other Courts of Appeal on similar matters, that the said Court of Appeals has decided an important question of Federal law which requires settlement by this Court, that the said Court of Appeals has decided a question of Federal law in a way in conflict with the applicable decisions of this Court, and that the said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. Is the principle of proximate cause applicable in determining whether a statutory violation could not possibly have contributed to the damage arising from a marine collision?

2. Does the conclusion that the proximate cause of the damages arising from a marine collision involved an event unrelated to a violation of law, preclude further inquiry as to whether a proven violation of law could possibly have contributed to such damages?

3. Can a statutory violator establish that its violation could not possibly have contributed to the damages arising from a marine collision by a mere preponderance of the evidence in favor of the more probable causal connection being other than the statutory violation?

4. Must an Appellate Court examine the entire record to determine whether a statutory violation could possibly have contributed to the damages arising from a marine collision?

5. Must an Appellate Court accept a conclusion of the trial court, based upon credible evidence, that a statutory violation could not possibly have contributed to damages

arising from a marine collision, when the evidence taken as a whole fails to exclude the possibility?

6. Does a portion of a bridge structure which deviates from the plans approved by the permit of the Secretary of War constitute an illegal obstruction to navigation?

7. Is a portion of a bridge structure not shown upon plans approved by the permit of the Secretary of War presumed to be an illegal obstruction to navigation?

8. Is a portion of a bridge structure an illegal obstruction to navigation where the bridgeowner is unable to prove that its construction was positively approved by the Secretary of War?

9. Does §401 (Title 33, U. S. C.) prescribe a different standard for the approval of a proposed bridge across navigable water lying wholly within a state than §491 (Title 33, U. S. C.) prescribes for the approval of a proposed bridge across navigable water between two states?

10. May a bridgeowner recover for damages to its bridge resulting from collision with a vessel, the maneuverability of which was impaired by the statutory violations of the bridgeowner in failing to open the draw promptly on signal or to give notice of delay in opening the draw?

11. Is a bridgeowner liable for the damages resulting from the collision of a vessel with its bridge, when it has failed to show that it complied with statutory requirements in the operation of the draw span and that the non-compliance was not and could not have been one of the causes of the collision?

STATUTES INVOLVED

(1) Rivers and Harbors Appropriation Act of March 3, 1899, §9, 30 Stat. 1151, Title 33 of the United States Code,

Section 401. The statute reads as follows:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War*: PROVIDED, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War* before construction is commenced; AND PROVIDED FURTHER, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War*, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War*.

*NOTE: The title "Secretary of War" was changed to "Secretary of the Army" by Section 205(a) of the Act of July 26, 1947.

(2) Title 33, U.S.C. (Navigation and Navigable Waters) §499 (Act of Aug. 18, 1894, c. 299, §5, 28 Stat. 362; June 13, 1902, c. 1079, §6, 32 Stat. 374) reads, in part, as follows:

§ 499. **Regulations for drawbridges; penalties for violation; enforcement**

It shall be the duty of all persons owning, operating, and tending the draw bridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause

to be open, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of draw bridges for the passage of vessels and other water craft, and such rules and regulations, when so made and published, shall have the force of law. • • • •

(3) Title 33 (Code of Federal Regulations) Sections 203-210 read, in part, as follows:

ATTENDED BRIDGES over *all navigable waters discharging into the Atlantic Ocean south of and including Chesapeake Bay and the Gulf of Mexico, except the Mississippi River, its* tributaries and outlets:

(a) Corporations or persons owning or controlling a drawbridge shall provide the same with the necessary tenders and the proper mechanical applicances for the safe, prompt, and efficient opening of the draw for the passage of vessels.

(b) If the weather conditions are good and sound signals can be heard when a vessel approaches a drawbridge and desires to pass through the draw, three distinct blasts of a whistle or horn shall be sounded or three calls through a megaphone shall be made from the vessel when within reasonable hearing distance of the bridge.

(1) When the draw of the bridge can be opened immediately, the drawtender shall reply by three distinct blasts of a whistle or horn, by three calls through a megaphone, or by three loud and distinct strokes of a bell.

(2) When the draw of the bridge cannot be opened immediately or when the bridge is open and is to be closed immediately, the drawtender shall reply by four or more short, distinct blasts of a whistle or horn, by four or more calls through a megaphone, or by four or more loud and distinct strokes of a bell (danger signal).

(c) When weather conditions prevent hearing the sound signals when a vessel approaches a drawbridge and desires to pass through the draw, signals shall be made from the vessel by swinging in circles at arm's length lantern at night and a flag by day.

(1) When the draw of the bridge can be opened immediately, the drawtender shall reply by raising and lowering in vertical plane a number of times a lighted lantern at night and a flag by day.

(2) When the draw of the bridge cannot be opened immediately or when the bridge is open and is to be closed immediately, the drawtender shall reply by swinging to and fro horizontally a number of times a lighted lantern at night and a flag by day.

• • • • •

(g) The draw shall be opened with the least possible delay upon receiving the prescribed signal: Provided, that the drawspan shall not be opened when a train is approaching so closely that it cannot safely be stopped before reaching the bridge, or when a passenger or mail train is approaching within sight or hearing of the operator of the drawspan.

• • • •

STATEMENT OF CASE

On October 5, 1955, South Carolina State Highway Department filed in the admiralty jurisdiction of the District Court of the United States for the Eastern District of South Carolina its Libel against the Tank Steamer FORT FETTERMAN, her engines, etc., in a cause of collision, civil and maritime. Subsequently, the Highway Department filed an amended Libel which alleged that on October 5, 1955, the FORT FETTERMAN collided with the highway bridge which spans the Ashley River and connects the City of Charleston with

St. Andrews Parish in the State of South Carolina; that the Highway Department is a department or agency of the State of South Carolina, in which is vested the function of maintaining and operating the state highway and bridges within the State of South Carolina; that as a result of the collision the Western bascule of the draw span was destroyed to the damage of the Highway Department in the sum of $250,000; that the collision and damage resulting therefrom were caused by the negligence of the FORT FETTERMAN, her master, agents and crew. The Amended Libel prayed that process be issued against the vessel, that the Highway Department have a decree for its damages, interests and costs and for such other and further relief as justice may require.

A Monition was duly issued by the Court, pursuant to which the United States Marshal attached the vessel and took it into custody. Within due course, Chas. Kurz & Co., Inc., filed claim as owner of the FORT FETTERMAN and also filed a stipulation for value and for costs in the amount of $250,000, whereupon the Marshal released the vessel from his custody.

The owner of the vessel answered the Amended Libel, denying the material allegations and alleging affirmatively that the collision was due to the fault of the Highway Department, its agents and servants, in improperly constructing, maintaining and operating the draw span of the bridge, which negligence on the part of the Highway Department, its agents and servants, was the proximate cause of the collision and consequent damage.

The owner of the vessel also filed its Cross-Libel in a cause of collision, civil and maritime, alleging that by reason of the negligence in the construction, maintenance and operation of the draw span of the Ashley River Bridge by the Highway Department, its agents and servants, the collision referred to

in the Amended Libel was occasioned and as a result thereof the FORT FETTERMAN was seriously damaged, to the damage of the owner of the vessel in the sum of $175,000, for which recovery was demanded against the Highway Department.

The Highway Department filed a reply to the Cross-Libel, denying the material allegations. The Highway Department also moved to dismiss the Cross-Libel and filed a special plea to the jurisdiction of the Court in respect to the Cross-Libel. The District Court denied the motion to dismiss and overruled the special plea to the jurisdiction, from which the Highway Department took an appeal to the United States Court of Appeals for the Fourth Circuit. On August 8, 1956, the Court of Appeals held that the appeal was premature and it was dismissed. *South Carolina State Highway Dept. v. Fort Fetterman*, 236 F. 2d 221.

In July 1957, the cause was tried before the Honorable C. C. Wyche, United States District Judge, upon the issues of liability raised by the Libel and Cross-Libel, deferring for subsequent determination the amount of damage suffered by the respective parties. On October 17, 1957, the District Court made its Findings of Fact and Conclusions of Law and filed its interlocutory decree, which required that the shipowner should pay to the Highway Department the amount of the Highway Department's damages, interest and costs, such amount to be determined by subsequent proceedings, and dismissed the Cross-Libel. *South Carolina St. Highway Dept. v. The Fort Fetterman*, 155 F. Supp. 359 (Appellants' Appendix No. 7604, p. 16).

The vessel and its owner appealed to the United States Court of Appeals for the Fourth Circuit from the Decree, Findings of Fact and Conclusions of Law of the District Court. On November 13, 1958, the Court of Appeals decided that

while the improper navigation of the vessel contributed to the damages, the protrusion of the gears beyond the face of the abutment in violation of the War Department permit also contributed to the damages and, furthermore, the bridge-owner had not borne the burden required by the *Pennsylvania* rule (The Pennsylvania, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148) of establishing that its statutory fault in deviating from the War Department permit in several particulars could not have caused or contributed to the damages. It was ordered that damages should be divided, the decree of the District Court being affirmed in part and reversed in part, and the cause was remanded. *The Fort Fetterman v. South Carolina State Hwy. Dept.*, 261 F (2d) 563. (Appendix, p. 1a).

Subsequently, the Court of Appeals denied the ship-owner's petition for rehearing and granted the Highway Department's petition for rehearing. After rehearing, it decided *per curiam*, on June 8, 1959, that while it adhered to the view that improper navigation of the vessel contributed to the damages, the cause should be remanded to the District Court so that it might (1) receive further evidence on whether the plans which were considered by the War Department in granting its permit contemplated that the gears would protrude beyond the faces of the abutments when the spans were opened and make findings as to whether the protrusions of the gear racks were in accordance with or in violation of the permit, (2) apply the *Pennsylvania* rule and in connection therewith receive further evidence bearing upon whether there was any statutory fault which could, by any reasonable possibility, have contributed to the damages, and (3) receive evidence in order to determine whether the Secretary of War and the Chief of Engineers approved of the deviations of the bridgeowner from the terms of the permit. The decree of the District Court was affirmed in part and reversed in part, and remanded, without directions to divide damages. *The Fort*

Fetterman v. South Carolina State Hwy. Dept., 268 F. (2d) 27. (Appendix, p. 12a)

In July, 1959, Judge C. C. Wyche, pursuant to the requirements of the remand, received further evidence. On September 26, 1959, the District Court filed its Opinion, Findings of Fact, Conclusions of Law and Decree, which required that the shipowner should pay to the Highway Department damages and the costs of suit, the amount to be determined by subsequent proceedings *South Carolina State High. Dept. v. The Fort Fetterman*, 177 F. Supp. 76 (Appellants' Appendix No. 8023, p. 1).

The vessel and its owner appealed to the United States Court of Appeals for the Fourth Circuit from the Opinion, Findings of Fact, Conclusions of Law and Decree of the District Court. On May 19, 1960, the Court of Appeals affirmed the decree of the District Court, holding that the Appellate Court was bound to accept the finding of the District Court that there was no statutory violation by the Highway Department which could have caused or contributed to the damage, since there was credible evidence to that effect, and that hence the burden imposed by the *Pennsylvania* rule had been met. *The Fort Fetterman v. South Carolina State Hy. Dept.*, 278 F. 2d 921. (Appendix, p. 15a)

The shipowner petitioned the Court of Appeals for a rehearing, principally upon the grounds that an erroneous result had been reached by reason of the failure of the Court to apply the *Pennsylvania* rule in consequence of (1) the Court imposing upon shipowner the burden of establishing as a fact that the statutory officials had actually disapproved the construction of the bridge with protruding gear racks, whereas the law imposes upon the bridgeowner, as the permitee of the statutory permit, the burden of establishing unequivocally that any deviation from approved plans had the affirmative ap-

proval of the statutory officials; (2) the Court's refusal to consider evidence that established the possibility, if not the probability, that the collision of the illegally overhanging span with the ship's superstructure could have caused or contributed to the accident; and (3) the Court imposing, in effect, upon the shipowner the burden of establishing that the admitted violation of law resulting from the illegally maintained overhanging span could have caused or contributed to the accident, whereas the rule places upon the violator the burden of establishing that it could not have done so. The Petition was denied by the Court of Appeals on July 1, 1960. (Appendix, p. 22a).

STATEMENT OF FACTS

The South Carolina State Highway Department is a department or agency of the State of South Carolina which owns, maintains and operates a bridge for highway traffic across the navigable waters of hte Ashley River extending from the Western shore of the City of Charleston to the area known as St. Andrews Parish, both in the State of South Carolina. At the main ship's channel of the Ashley River the bridge opens to permit passage of vessels proceeding along the channel. The opening of the bridge is accomplished by raising two bascule or lift spans.

By the Act of March 3, 1899 (33 U.S.C., Sec. 401), Congress authorized the construction of bridges across navigable streams "provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been

submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army."

It is not now known whether in 1923 regulations were promulgated by the Secretary of War in respect to the applications for permits, but a printed form of application for permit was prescribed by the Secretary of War, upon the face of which there was set forth the information necessary for his consideration. Among other things, the printed application required that there be submitted "plans of the proposed structure . . . herewith as follows: (b) Plan of the bridge showing the length and height of spans, width of draw openings, position of piers, abutments, fenders, etc., and those features which affect navigation, giving on both horizontal sections and elevations the outside structure lines separating the area left for navigation from the area occupied by the bridge, and, in figures, the least clear width of openings at right angles to the axis of the channel, and the least clear heights with reference to high water, ordinary boating water, and low water. (c) The essential features of the draw in two positions, closed and fully open." On the back of the printed application form were instructions, and under "IV. Drawings," among other things the following: "(d) Structural Details. Only those should be shown which are *needed* to illustrate *the effect* of the proposed structure *on navigation*. The omission of all *other* details is generally preferable." (Emphasis added) (25a-G).

On April 19, 1923, the Sanitary & Drainage Commission of Charleston County filed with the United States District Engineer at Charleston, South Carolina, such an application addressed to the Secretary of War. (25a-F). It also attached to the application a plan of the proposed structure. On May 23, 1923, a formal permit was issued by the Secretary of War and the Chief of Engineers which required that the bridge be located, constructed, maintained and operated in accordance with the plans submitted with the application and which

were affixed to the permit.

The plans affixed to the permit (Appellants' Appendix No. 7604, p. 279) consisted of a blueprint, size 21 inches by 31 inches, and show that the bascule spans in a raised position shall be 138 feet apart at their extreme points of extensions and shall be at an angle of 82 degrees. The plans further show that the abutments shall be placed 146 feet apart, that they shall be 28 feet in thickness, and that there shall be no protrusions from the channelward faces thereof, except for a submarine cable below the water level. The plans also prescribe for the construction of fendering systems, outward a few feet from the abutments, so as to furnish a clear distance between the fender system of 138 feet. The location of the bridge, according to the plans, is such that it is at an angle of 70 degrees to the channel of the river and provides for a clear channel of 110 feet running diagonally between the extreme extensions of the points of the fendering systems. Because the bridge is located at an angle of 70 degrees to the channel of the river, a vessel proceeding up the river through the bridge opening is required to make a turn to the right before entering the bridge opening in order to pass parallel to the faces of the abutments and the fender piling.

After the issuance of the permit by the Secretary of War and the Chief of Engineers, detailed construction plans were prepared by the bridgeowner, but these were never submitted to the Secretary of War and the Chief of Engineers and were never considered by them. (Appellants' Appendix No. 8023, pp. 127, 128). An examination of the construction plans will show that when the spans were opened the gears would protrude 18 inches beyond the outward faces of the abutments, but nothing of the sort appears upon the permit plans and no examination thereof will disclose that such a protrusion was intended or contemplated. (Appellants' Appendix, No. 8023, p. 101). The construction plans also provide for a raising of

the spans to an angle no greater than 79° 30', in which position they would furnish a clear distance between the extreme points of the spans of no more than 130.9 feet and in that position they would overhang the fenders. (Appellants' Appendix, No. 8023, p. 58 and back of insert). No amendment of the permit was ever applied for or granted, except for an amendment in 1928 which was limited to the placement of two additional dolphins in front of the Northeast fender system. (Appellants' Appendix, No. 8023, p. 128).

The construction of the bridge was completed in 1926. As constructed, the gears used to raise the bascule spans protruded 18 inches beyond the faces of the abutments when the spans were opened, at a point a few feet above the fender piling. A limit switch prevented the bascule spans from being raised to a greater angle than 71 degrees, at which angle the extreme points of extension of the spans were only 107.3 feet apart and the Western bascule span extended beyond the outer face of its fender system by 14.3 feet. (Appellants' Appendix No. 7604, pp. 97, 257, 261). The same condition existed on October 5, 1955.

On October 5, 1955, the fender system on the Western side consisted of a single line of piling, without batter or supporting piles, joined by 4 inch strakes on the outer side; the pilings were in a state of deterioration, many of them completely eaten away and hanging on the strakes; in their condition, the pilings furnished little resistance to pressure from passing vessels and were readily depressible to the face of the abutment, the pilings were approximately 15 inches in thickness. The fender system was designed to be flexible so as to furnish only a chafing surface between the abutment and a passing vessel. (Appellants' Appendix, No. 7604, pp. 88, 237, 238, 272).

The FORT FETTERMAN is a T-2 Tanker of 10,457 gross

tons, with an overall length of 523 feet 6 inches, a beam of 68 feet 2 inches, and measures from the main deck to keel 39 feet. Her hull is all steel construction and she is powered with a single screw. Her forward house or superstructure is of steel construction, containing four decks above the main deck rising to a maximum height above the main deck of 34 feet 6 inches. The sides of the midship house or superstructure rise straight up from the sides of the hull to a height of 31 feet above the main deck.

On the morning of October 5, 1955, the vessel, while lying at anchor in Charleston Harbor, discharged to barges a portion of her cargo of cresote in order to attain a lighter draft required to proceed up the Ashley River and was trimmed to draw 15 feet fore and aft. A little before 9:00 A.M. the FORT FETTERMAN, in charge of an experienced master, fully manned with a competent crew and with an experienced local pilot, left her anchorage in the Cooper River and proceeded on her passage up the Ashley River to discharge her remaining cargo at the Koppers Company dock on the Ashley River above the highway bridge. At the time that this passage was begun, the tide was in the last stages of flood and the wind was from the East, with a velocity of approximately 15 miles per hour. The Tug FORT EDISTO proceeded ahead of the vessel for the purpose of notifying the bridge to open in time for the vessel's passage and to assist the vessel in docking.

Near the Coast Guard Station and when more than a mile from the bridge, the ship blew its signal for the bridge to open and at about the same time the tug, then approximately half a mile from the bridge, gave a similar signal. When the bridge did not open in response to the first signal given and gave no responsive signal, the vessel's speed was reduced and a second signal was given by the vessel and by the tug. When the bridge did not open and no responsive signal was given after the second signaling by the vessel and the tug,

the vessel maintained its forward passage at reduced speed and the tug hove to at the bridge. When the vessel was approximately half a mile from the bridge, a third signal was given and shortly thereafter the bridge signalled that it was opening and the bascule spans began to lift. When the bascule spans were raised, the tug proceeded through the channel opening and the vessel increased its speed, which had been reduced to approximately 2 knots.

When the bridge had opened, the vessel was approximately three and a half ship-lengths from the bridge in about the middle of the channel, proceeding in a Northwesterly direction at a speed of 2 knots through the water, with the current slack or slightly flooding and the wind at a velocity of 16 miles per hour from the East. The vessel's speed was increased to half speed ahead and then full speed ahead and a hard right rudder was given to bring her bow over toward the North in order to pass parallel to the faces of the abutments and protective fender pilings. After the bow of the ship had satisfactorily passed through the opening, the vessel crabbed in a westerly direction and at 9:39 A.M. the port hull of the vessel, at a point about 40 feet forward of the midship house and 135 feet aft of the bow, made contact with the Western fendering system and the order for hard left rudder was given. The fender did not hold the vessel sufficiently away from the abutment and the port hull of the vessel scraped the protruding teeth of the downstream gear rack at about the point of its first contact with the fender pilings. The hull of the vessel continued to scrape along the fender pilings and the downstream girder of the overhanging bascule span struck the midship house of the vessel. The blow from the downstream girder of the bascule span and the subsequent collapse of the span caused extensive damage to the bridge and to the vessel.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. ***The Courts below have misconstrued and misapplied the established rule that a statutory violator involved in a maritime collision must prove unequivocally that its fault could not have contributed to the disaster.***

(a)

The plans approved by the Secretary of War for the construction of the Ashley River Bridge, specifically provided that the bascule spans when raised at the draw opening should not protrude beyond the fenders and should be raised to an angle of 82 degrees. In violation of this requirement, the bridge was constructed and maintained so that on October 5, 1955, the Western bascule span, when raised for the passage of the FORT FETTERMAN through the draw opening, protruded into the opening 14.3 feet beyond its fender piling, and each bascule span was raised to an angle of only 71 degrees. It was found by the District Court, and concurred in by the Court of Appeals, that the spans, as so raised, constituted a violation of law on the part of the bridgeowner.

At the trial of the case, it was unequivocally established that with the Western bascule span raised to only 71 degrees the midship house and superstructure of the FORT FETTERMAN would strike the overhanging span when sliding along or in the proximity of the fender piling, and that if the span had been raised to 82 degrees, no collision between the FORT FETTERMAN and the raised span could have occurred. The fender pilings were approximately 3½ feet outward from the abutment upon which the bascule span was located. Above the fender piling and below the bascule span was a gear rack which moved in a constant arc for use in raising and lowering the span and this gear rack protruded 18 inches beyond the face of the abutment when the span was opened.

In passing through the opening 135 feet of the bow of the FORT FETTERMAN proceeded through the draw without contact, but a sheer of the vessel brought the port hull against the Western fender pilings so that the port hull depressed the pilings and scraped the protruding gear rack. The midship house and superstructure of the vessel then collided with the overhanging span, which raked the vessel as it passed along through the opening, thereby causing the collapse and destruction of the span and the damage to the vessel. (See the dramatic sequence photographs, appendix, pp. 25a-A, B, C, D).

After trial, the District Court, on October 17, 1957, made its findings of fact and conclusions of law. The Court found, among other things, that the accident was due to the negligent navigation of the vessel which caused it to strike the gear rack and that this blow resulted in the damage to the bridge and to the vessel. It was also concluded by the District Court that there was no negligence on the part of the Highway Department in causing the collision which resulted in the damages. A decree was entered in which it was adjudged that the bridgeowner should recover the full amount of damages sustained by it and that the cross-libel should be dismissed.

An appeal from this decree of the District Court resulted in the decision of the Court of Appeals, dated November 13, 1958, which affirmed in part, reversed in part and remanded the cause to the District Court for a division of damages. This decision of the Court of Appeals affirmed those findings and conclusions of the District Court which were to the effect that the vessel was negligently navigated and that such negligence caused the collision and consequent damage. However, it was held that the District Court was in error in concluding from the facts that the shipowner's negligence and the initial impact with the gear rack was the sole proximate cause of the collision and damages, in that the bridgeowner had failed to establish that its violation of law could not, with

reasonable possibility, have contributed to the disaster. It therefore concluded that the damages should be divided. Among other things, the Court of Appeals stated as follows: (7a).

> With the bascule spans at a maximum elevation of 71 degrees, if the vessel had proceeded through parallel and immediately contigous to the west fender line, where it admittedly had the right to be, the parties concede that the top of the ship's superstructure on the port side would have come in contact with the uppermost point of the raised bascule. The District Judge held that this fault on the part of the bridge never became an operative factor as the effective damage had already taken place and, furthermore, that such damage, if incurred, would have been speculative and negligible.
>
> It is the legal presumptions and conclusions of the lower court with which we must disagree. It is said by the district judge that any deviation from the approved War Department permit shall not be considered unless such deviation was the proximate cause of, or contributed to, the collision and damages. We believe that the factual situation here presented calls for the clear application of the rule as stated in *The Pennsylvania*, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 147, to the effect that the burden rests upon the party guilty of a stautory fault to show, not only that *probably* his fault did not contribute to the disaster, *but that it could not have done so.*

After granting a rehearing, the Court of Appeals in a *per curiam* decision dated June 8, 1959, revised its decision of November 13, 1958, and remanded the case to the District Court for further proceedings without directions to divide damages. In that decision the Court stated, among other things, as follows: (13a).

> We think it clear that *The Pennsylvania* rule must be applied with relation to the statutory fault existing as to the maximum elevation of the raised bascule spans. While we accepted the lower court's finding that the initial impact between the vessel and the bridge was at the gear rack, we do not agree on the record before us that the damage to the bascule span would not necessarily have occurred under the "reasonable possibility" test as stated in our previous opinion. The trial court, *having failed to apply The Pennsylvania* rule, may now consider *the existing record* and will undoubtedly permit *further evidence* on this point, as well as upon any other contended statutory fault. (Emphasis added)

In July, 1959, a further hearing was had by the District Court. During the course of this hearing, the shipowner attempted to show that the collapse of the span and the consequent damage could have been caused by the collision which occurred between the midship house of the vessel and the overhanging bascule span at a point above the gear rack. The District Court ruled that any evidence of a collision other than at the gear rack must be excluded from consideration as a possible cause of the collapse, it being the District Court's view that having previously decided that the sole proximate cause of the collapse of the span was the blow to the gear rack from the port hull of the vessel, it was necessary for the Court to exclude from consideration any other possible cause of the collapse. (Appellants' Appendix. No. 8023, pp. 59, 60, 63, 64, 65, 70, 71, 72, 73, 74, 85, 86, 104, 105).

In his findings and conclusions dated September 26, 1959, the District Judge again found that the blow of the hull of the vessel against the gear rack and girder at 71 degrees effectively destroyed the bridge and inevitably produced the damage thereto.. Accordingly, the District Court reasoned that had the bridge been elevated to 82 degrees instead of 71 degrees

the *result* would have been the same, since the protrusion of the gear rack would have been the same, and the Court found that the effect of a blow at the gear rack by the hull of the vessel would not in any way be changed by the difference in degree of elevation. There was no finding with regard to whether the collision between the midship house of the vessel and the girder of the span above the gear rack could have caused or contributed to the collapse and consequent damage, thus making it obvious that this aspect of the matter was eliminated from consideration. The District Court's conclusion was that the evidence had established that there was no reasonable possibility that the bridgeowner's statutory fault in elevating the bridge to 71 degrees instead of 82 degrees could have caused or contributed to the accident. The decree of the District Court was that the bridgeowner should recover in full for its damages.

On appeal from the decision of the District Court dated September 26, 1959, the Court of Appeals decided on May 19, 1960, that the decree should be affirmed. The Court of Appeals stated in its opinion that it could "not say that the District Court was clearly in error in reaching the conclusion that no material damage would have resulted if the vessel had not struck the gear rack," as that was a matter to be determined by "credible evidence." The Court of Appeals says that in the light of the decision of this Court in *McAllister v. United States*, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20, it must accept, "irrespective of our personal views," the conclusion of the District Court that the overhanging bascule could not have contributed to the disaster, and "even though a portion of the vessel's superstructure would perhaps have come in contact with the overhanging bascule if it had proceeded through the opening without striking the gear rack."

We respectfully submit that the Court of Appeals was clearly in error in its decision of May 19, 1960, in respect to

its application of an important and accepted rule of admiralty law. It appears to us that the application in this case of the so called *Pennsylvania* rule by the Courts below renders the rule meaningless and disregards its clear intent and purpose.

The settled admiralty rule of law in collision cases is that where a positive breach of statute has been committed, the violator must show not merely that probably his fault did not contribute to the disaster, but that it could not have done so. This rule was first recognized by this Court in *The Pennsylvania*, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, and reaffirmed in *The Martello*, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637; *Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398; *Belden v. Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; *Lie v. San Francisco & Portland S. S. Co.*, 242 U. S. 291, 37 S. Ct. 270, 61 L. Ed. 726. In innumerable decisions of District Courts and Courts of Appeals the rule has been recognized and applied. It has been repeatedly said by the Courts that the rule must be strictly adhered to, although it is a harsh rule and imposes a burden upon the statutory violator which usually is difficult, if not impossible, to meet. Implicit in the application of the rule is the necessity that the statutory violator shall establish by evidence, beyond a reasonable doubt, that the violation could not possibly have contributed to the accident. Where the evidence leaves in doubt whether the violation could have contributed to the accident, the burden has not been met and the statutory violation is presumed to have been a contributing cause of the accident. *States Steamship Co. v. Permanente Steamship Corp.*, 231 F (2d) 82.

The improper application of the rule in this case by the courts below results from the refusal to consider the possibility of a causal connection in respect to the accident from that feature of the bridge which was constructed and maintained in violation of law. The reasoning of the courts below

is that, having accepted an hypothesis, based upon credible evidence, that the "proximate cause" of the accident stemmed from a collision with a portion of the bridge structure other than that portion maintained in violation of law (although a physical part of such illegal portion), there is no need to give further consideration to the question whether the existence of the illegally maintained portion of the structure could have been a contributing cause of the disaster. In consequence, their ultimate determination of the causal connection rests upon a factual finding derived solely from weighing the probabilities and does not permit the consideration of possible causal connections, which the proper application of the rule requires.

When the District Court decided, after the first trial, (without applying the *Pennsylvania* rule) that the sole proximate cause of the collapse of the span was due to the blow of the hull upon the gear rack, it based this decision upon the testimony of expert engineering witnesses produced by the bridgeowner. It was testified by these experts that, in their examination of the wrecked span, they found that the gear rack was twisted in an upstream direction and the girder was broken in the proximity of the gear rack, and they were of the opinion that, assuming a collision between the hull of the vessel and the gear rack, such collision had done the damage to the gear rack and the span was thus caused to collapse. Some of these witnesses agreed that a blow from the vessel's superstructure to the overhanging girder, rather than the blow to the gear rack, could have brought about the same damage; others did not concede that this was a reasonable possibility but could point to no physical evidence which would refute the possibility. On the other hand, the expert engineering witnesses produced by the shipowner were of the opinion that the cause of the collapse of the span was due to a blow upon the girder of the span at a point above

the gear rack and cited concrete physical evidence found by them in support of this opinion and in refutation of the contrary hypothesis. These latter witnesses further stated that the damage observed by them to the gear rack and the manner in which the girder at that point was bent was inconsistent with the collapse of the span having been brought about by a blow to the gear rack. There were no eye-witnesses who could say that they saw the span collapse as the result of the hull striking the gear rack, and the witnesses aboard the vessel, as well as several other eye-witnesses on the bridge, testified that there was no collapse of the span until it was struck by the midship house of the vessel. This evidence when weighed by the District Court led to the finding that the proximate cause of the damage was the striking of the gear rack.

After the Court of Appeals remanded the cause to the District Court for further proceedings, with directions to consider whether the collision of the vessel with the illegally overhanging span could have caused or contributed to the resulting damage, the District Court refused to consider any *effect* upon the accident from the illegally positioned span except to the extent that it might be related to the blow upon the gear rack. (19a) It is surprising that the Court of Appeals, in its most recent decision, accepted this ruling of the District Court in view of the expressions in its earlier decisions. Apparently, although the Court of Appeals directed the District Court to determine whether the violation of law existent from the overhanging span could have contributed to the accident and to take further evidence on this subject, it subsequently felt bound to accept the District Court's finding after rehearing, despite the lack of new evidence to support this finding. The fallacy in the conclusion of the Court of Appeals that it is compelled to accept this finding of the District Court lies in the fact that the District Court did no

more than reaffirm its earlier finding that the sole proximate cause of the damage was the collision with the gear rack and by this process excluded from consideration the possible causal connection to the damage from the collision with the illegally overhanging bascule.

In solving the legal question of cause and effect in this case, we have, occurring within seconds, two physical facts: (1) the physical collision between the protruding gear rack and the port hull of the vessel; and (2) the physical collision between the overhanging bascule span and the midship house of the vessel. We also have a third physical fact: (3) the collapse of the bascule span upon the vessel and into the water. These physical facts, occurring in temporal sequence, are known. What is unknown is the effect or consequences of physical facts (1) and (2), isolated from each other. The inquiry, therefore, is: what relationship has the third physical fact, or result, to physical facts (1) and/or (2)? Because it is undisputed that physical fact (2) involved a violation of law (a physical collision with an illegal structure) the rule of *The Pennsylvania* requires that the violator of law establish not merely that its violation of law might not have been one of the causes, or that it probably did not cause the accident and ensuing damages, but that its violation could not by any reasonable possibility have done so. The violator's duty is to exclude the possibility of damage which the law presumes to flow from its violation. Under these circumstances, there are two possibilities here; either hypothesis, to explain (3), based on physical fact (1) or physical fact (2) is reasonably possible. The selection of one as probable does not eliminate the other as a reasonable possibility. Only by considering *both* and by disproving one is the doubt removed as to the reasonable possibility of the one as opposed to the other. Unless both are considered, the reasonable doubt cannot be laid at rest and it cannot be said that the other is impossible. Per-

haps it would be going too far to say that *The Pennsylvania* rule requires the evidence to exclude the presumption by every reasonable inference, but the rule is clear that, at the very least, the presumption of law remains in the case despite contrary evidence brought forward by the violator, and where the entire evidence leaves the possibilities reasonably in doubt or fails to show the impossibility of the ensuing damage from the violation, then the rule must be applied inexorably and it is legally presumed that the violation of law, "if not the sole cause, was at least a contributing cause of the disaster." *The Pennsylvania*, supra.

The inquiry as to what was the proximate cause of the collision is not the same as the inquiry in regard to whether a statutory violation could have contributed to the collision. The first inquiry requires only that the evidence be weighed to determine the more probable causal connection even though other possibilities exist, while the second inquiry demands that all reasonable possibility of a causal connection between the damage and the violation be non-existent. The degree of proof in relation to these two inquiries is not the same and evidence that may satisfy the first would not fulfill the requirements of the second. It therefore follows that even though there may be no basis for the appellate court to refuse to accept the finding of the District Court that a proximate cause of the damage came from the collision of the ship's hull with the gear rack, the evidence in the record leaves unanswered the question whether the collision of the vessel's superstructure with the illegally overhanging span could have contributed to the accident and it must therefore be concluded as a matter of law that this statutory violation presumptively caused or contributed to the damage.

We cannot see how, in justice, the District Court's conclusion in the first trial (without application of the *Pennsylvania* rule) that the evidence preponderated toward a finding

that the initial impact between gear and hull "effectively" caused the ensuing damages, could foreclose the application of the *Pennsylvania* rule to any statutory violation in the second trial. The question of the consequences flowing from the initial impact between gear and hull and the second impact between overhanging span and superstructure was an issue in the first trial, and the lower Court was duty bound to reach conclusions as to such consequences by application of the rule to the possibilities as well as to what it regarded as probabilities. The Court of Appeals held that the Appellants were clearly entitled to the application of the "reasonable possibility test" in the first trial. It seems strange, indeed, that the lower Court could be allowed to make a piecemeal determination of the question of causation and consequences in the first trial without application of the "reasonable possibility test", and use that initial conclusion as a basis for foreclosing the issue of such consequence in the second trial. We submit that this Court did not intend that the lower Courts should pay such lip service to the *Pennsylvania* rule.

To the trial judge the *Pennsylvania* rule and its application to the instant case is a matter of mere semantics, and it is small wonder that whereas he concluded in his first decree that the blow to the gear rack was "the sole and only effective cause" of the damage, in his second decree, after remand, he stated that the blow against the gear rack was "the sole possible and only proximate cause" of the damage.

It is definitely known that the vessel's superstructure collided with the overhanging span when the span was raised to only 71 degrees, instead of 82 degrees as required by law, and that the span collapsed with resultant damage to the bridge and the vessel. In the language of *The Pennsylvania*, "if it be said that it is speculation" to conclude that the disaster *would not* have occurred *if* the span had been raised to 82 degrees, "it is a speculation rendered necessary by the fault

of the" bridgeowner. Any conclusion that the *same* damage *would have* occurred *if* there been no collision with the overhanging span is also factual speculation. Paraphrazing what was said by this Court in *The Pennsylvania*, supra, it is "speculative to conclude that" the collapse of the span and consequent damage "would have taken place if" there had been no collision with the illegally maintained span, "and infer therefrom that the fault" of the bridgeowner in failing to maintain its bridge in compliance with law "had no relation to the disaster." Since there was a collision with the overhanging span, the possible contribution of this collision to the damage must be considered even though a more probable conclusion is that there was no causal connection. It is not enough to examine only the circumstances relating to the collision with the gear rack and, having concluded from weighing the evidence that this collision was the proximate cause of the damage, then eliminate from consideration the possible effect of the collision with the overhanging span. The process of reasoning of the District Court was clearly violative of these principles and the Court of Appeals was in no respect bound to accept, as it did, the "finding" of the District Court that the violation of law resulting from the overhanging bascule span could not have contributed to the consequent damage.

(b)

The holding of the Court of Appeals that, irrespective of its own personal views, it must accept the findings of the District Court has the effect of abandoning to the District Court the validity of the legal conclusions reached by the District Court, and has permitted the trial judge to pay lip service to the *Pennsylvania* rule and yet apply the same in a manner which does violence to the rule itself. If the sufficiency of the evidence bearing on the exacting standard of the rule is not measured by the Appellate Court in testing the validity of the

District Court's conclusions, the rule itself is rendered meaningless.

There are numerous situations in civil actions where the law requires a higher degree of proof to establish the ultimate fact than the mere preponderance of the evidence before a party on whom the law casts the burden can recover. Such burden is usually characterized by the Courts as necessitating "clear, convincing and unequivocal proof." *Zolntakis v. Orfanos*, 119 F. 2d 571; *Equitable Life Assur. Soc. v. Aaron*, 108 F. 2d 777; *Page v. Page*, 132 Va. 63, 110 S. E. 370.

The exacting requirements of the *Pennsylvania* rule can be analogized to the heavy burden placed by this Court upon the proponent in denaturalization cases, where this Court has said that the requisite measure of proof must be by "clear, convincing and unequivocal" evidence which does not leave the ultimate "issue in doubt." *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796; *Baumgartner v. United States*, 322 U. S. 665, 88 L. Ed. 1525; *Nowak v. United States*, 356 U. S. 660, 2 L. Ed. 2d 1048.

In such cases, this Court has said "it becomes our duty to scrutinize the record with the utmost care" to ascertain whether "that exacting standard of proof has been satisfied on the whole record." *Baumgartner v. United States*, supra. A study of these decisions and the decisions of the Circuit Courts of Appeals on this subject makes it clear that an Appellate Court's function is not restricted to merely ascertaining whether there is substantial evidence in the record to support the socalled "finding of fact" of the trial court or the ultimate conclusions of the Courts below. In enunciating the function of an Appellate Court, where such an exacting standard of proof is applicable, Mr. Justice Frankfurter, speaking for the Court, had the following to say in the *Baumgartner* case. (p. 670):

> " " The conclusiveness of a "finding of fact" depends

on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. See, e.g., Beyer v. Le Fevre, 186 U. S. 114, 46 L. Ed. 1080, 22 S. Ct. 765. * * * Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing. Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof, see Schneiderman v. United States, supra (320 U. S. at 125, 87 L. ed 1802, 63 S Ct 1333), on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Various Courts of Appeals have held that it is the proper function of an Appellate Court to review the record in reaching a determination whether an ultimate fact has been properly found by the trial court, upon the theory that the appropriate

standards for arriving at the ultimate fact require the application of legal principles to the subsidiary facts. We call to the attention of the Court some decisions of Courts of Appeals on this point. *United States v. Profaci*, 274 F. 2d 289 (Denaturalization case); *Lehmann v. Acheson*, 206 F. 2d 592 (Denaturalization case); *Kuhn v. Princess Lida*, 119 F. 2d 704; *Brown v. Cowden Live Stock Co.*, 187 F. 2d 1015 (Contract case).

In the *Lehmann* case, the Court of Appeals for the Third Circuit states as follows: (p. 594).

> The District Court found as a fact that expatriation had taken place. With respect to that finding it must immediately be noted that it was in the nature of an ultimate finding of fact and on that score it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called "clearly erroneous" rule applicable to ordinary findings of fact by the trial court.
>
> Our problem then, in short, is to determine whether the evidence on which the District Court premised its ultimate finding of fact of expatriation measures up to the applicable legal standard of proof. (Citing cases)

In the *Brown v. Cowden Live Stock Co.* case, the Court of Appeals for the Ninth Circuit stated as follows: (p. 1018).

> The findings of the District Judge in this regard are in effect findings *as to the effect of these transactions* rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn. (Emphasis added).

In *Stevenot* v. *Norberg*, 210 F. 2d 615, the Court of Appeals for the Ninth Circuit stated as follows: (p. 619).

> Appellees argue that we are bound by the foregoing findings since the record does not show that they are clearly erroneous. We do not think so. When a finding is essentially one dealing *with the effect of certain events*, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside unless clearly erroneous, but is free to draw its own conclusions. (Emphasis added).

In the case of *Consolidated Naval Stores* v. *Fahs*, 227 F (2d) 923 (Tax case), the Court of Appeals for the Fifth Circuit stated as follows: (p. 925).

> Insofar, however, as the so-called "ultimate fact" is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is subject to review free of the restraining impact of the so-called clearly erroneous rule.

It seems to us that the Court of Appeals has arrived at an erroneous result by misconstruing the application of *The Pennsylvania* rule, because of its views on the effect of the decision of this Court in *McAllister* v. *United States*, supra. We can find nothing in the decision of the *McAllister* case which requires an appellate court to accept a "finding" of a trial court that a statutory violation could not have contributed to damages arising from a marine collision, merely because there was some credible evidence to support a finding that the most probable proximate cause of the damages was unrelated to the violation. The determinations reviewed in the *McAllister* case were concerned with the establishment of ultimate facts which were to be arrived at by weighing evidence relat-

ing to the most probable causal connection, and therefore the only needed inquiry by the appellate court was as to whether there was sufficient evidence from which it could be concluded that the ultimate fact found in the trial court could reasonably have been arrived at. The matter for appellate review in the case at bar is whether the evidence, as a whole, reveals no possibility that an established statutory violation could have had a causal connection with the damgaes, and the inquiry on appeal must necessarily be whether upon the entire record before the trial court there was legal justification for the conclusion of no possible causal connection between the statutory violation and the damages. The effect of the *McAllister* decision is certainly not to require that every finding of the trial court must be accepted, and when it is patent, as here, that the trial court has refused to consider evidence bearing upon a possible causal connection between a statutory violation and damages resulting from a marine collision, a conclusion which rejects the possibility of such causal connection must be discarded. In doing otherwise the Court of Appeals has accepted the assertion of the District Court that the requirements of *The Pennsylvania* rule were adhered to, when the record shows clearly that they were not.

2. *The Courts below have erroneously decided that a portion of a bridge structure over a navigable stream was not constructed in violation of law although such construction deviated from plans approved by the Secretary of War.*

Pursuant to the requirements of the Rivers and Harbors Appropriation Act of March 3, 1899 (33 U.S.C., Sec. 401), and in accord with legislative authority of the State of South Carolina, the Sanitary and Drainage Commission of Charleston County applied to the Secretary of War for a permit to construct a bridge across the Ashley River, a navigable stream wholly within the limits of the State of South Carolina. With this application there was submitted by the applicant plans

of the structure which it desired to build. On May 23, 1923, the Secretary of War, exercising his statutory authority, approved the application and the plans which had been submitted. Attached to and made a part of the official permit, signed by the Secretary of War and the Chief of Engineers, were the approved plans.

The plans show that nothing is to protrude from the outer faces of the abutments at the draw opening other than the bascule spans in closed position and a submarine cable below the mud line. It is not shown that the gear racks or any other mechanical device shall protrude from the abutments. It is also shown that the abutments are to be 28 feet thick and are to be 146 feet from face to face. The plans further show that fender pilings are to be constructed outward from the abutments and are to be so placed as to be 138 feet apart.

In applying for the permit the applicant represented, as required by the Secretary of War, that the "plan of the proposed structure" submitted with the application showed the "length and height of the spans, width of draw openings, position of piers, abutments, fenders, etc., and those features which affect navigation * * *" and "the essential features of the draw, closed and fully open". The application was upon a printed form supplied by the War Department, with the necessary insertions made by the applicant. (25a-F).

The permittee constructed the bridge so that the gear racks would protrude 18 inches outward from the abutments into the draw opening when the spans were raised. No representation was ever made to the Secretary of War that this construction was intended or desired, and no permission was ever sought or obtained to so construct the bridge. There is no evidence whatsoever in the record that the Secretary of War ever knew or had any intimation that the bridge was to be constructed or was constructed with the gear racks protruding into the draw opening between the abutments.

The District Court found that the cause of the damage was a collision between the vessel's port hull and the Western downstream gear rack, and further found that this gear rack was not a structure constructed and/or maintained in violation of law. The District Court based its decision that this construction was not in violation of law upon the theory that the protrusion was "not a feature affecting navigation and was not required to be shown on plans submitted for approval."

Testimony was given at the second hearing before the District Court by some employees of the District Engineer's office that, since the protruding gear rack construction was behind the line of the fender pilings, they did not regard this as affecting navigation. They agreed that it was a matter of judgment whether such construction constituted a hazard to navigation and that if the Secretary of War had considered the construction a hazard to navigation he would have disapproved it. Other War Department employees testified that, in their opinions, the construction did constitute a hazard to navigation and that it should not be permitted, except upon condition that proper protection by fendering or otherwise be prescribed by the permit. All of the witnesses agreed that the question as to whether the construction was hazardous or would affect navigation was for the determination of the Secretary of War. There is nothing in the record to show that there was ever an official interpretation made by the War Department with respect to whether this construction or a construction of this nature, would or would not affect navigation.

Upon the first appeal to the Court of Appeals, that Court held that since no showing had been made that the protruding gear racks were constructed with the approval of the Secretary of War, it must be concluded that this construction was in violation of law and, having contributed to the collision, the bridgeowner was at equal fault in bringing about

the damage caused by the improperly navigated vessel. After rehearing, the Court of Appeals remanded the cause to the District Court, with directions to take further evidence and make further findings upon this subject. In this connection, the Court of Appeals stated as follows: (13a).

> If *such a protrusion* was *contemplated* by the plans, it is not, of course, a deviation from the plans and specifications and there would be no statutory fault with respect to the gear racks, as the structure would be lawful to that extent. We therefore conclude, in order that this important issue be decided in the light of all the available testimony, that on the remand the parties should have an opportunity to present further evidence on the point and that the District Judge should make appropriate findings based on the present record and such additional evidence as the parties may present as to whether the protrusion of the gear racks was in accordance with or in violation of the permit issued by the War Department. (Emphasis added)

In its decision of May 19, 1960, the Court of Appeals held that the shipowner did not bear the burden of establishing that a statutory fault existed with respect to the protruding gear racks, since it was not shown that the Statute (33 U.S.C.A. Sec. 401), as interpreted by the Army Engineers, contemplated the submission of "detailed" drawings to show this feature of the bridge construction.

The Court of Appeals sought to distinguish the requirements of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. § 401, under which the bridgeowner here had obtained its permit) from the requirements of the Bridge Act of 1906 (33 U.S.C. § 491), on the grounds that § 401 requires the submission to and approval of "the location and plans" of the bridge by the Secretary of War, whereas § 491 requires that the "plans and specifications for its construc-

tion" be submitted to and approved by the Secretary of War before construction is commenced.

On the basis of comparing the two statutes, the Court of Appeals drew a distinction, and concluded that since detailed drawings and specifications were not a condition precedent to issuance of the permit under § 401, and were never submitted to the Secretary of War and the Chief of Engineers, the District Court was justified in finding that the protrusion of the gear racks was not required to be shown on the "location and plans" submitted for approval.

Aside from the fact that *both* statutes provide that when the plans for any bridge have been approved by the Chief of Engineers and the Secretary of War, "it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and the Secretary of War", the distinction drawn by the Court of Appeals wholly disregards the specific wording of § 401, and erroneously holds that Congress intended that the plans of a proposed structure (which is the subject of approval under § 401) will be limited to specific portions of such plans, unless more is demanded by the statutory officials.

On the contrary, Congress has the undoubted right to concern itself with all features of the structure to be placed across a navigable stream, and has made illegal all of such structure which deviates from plans approved by the statutory officials.

Moreover, there is no factual basis for the so-called distinction. It is noteworthy that the question was asked of Mr. Robert J. Kennedy, the chief civilian employee of the War Department dealing with permit matters, whether the same consideration would be given to applications under the two

statutes and he answered "Our consideration of plans would be the same, exactly the same in either event." It also appears from the testimony at the remand hearing that the same printed form of application to the War Department is used whether the applicant comes within Section 401 or Section 491, and the same showing is required by the War Department in either event. (25a-F).

Surely, the Congress is equally concerned with the availability to commerce of navigable streams, whether they be situated between two states or wholly within a state. It is inconceivable that Section 491 was intended to prescribe a different standard of inquiry into permits for structures than was prescribed by Section 401. The administrative practice shows that the same standards are observed. We respectfully suggest that the applicability of Section 401 rather than Section 491 to the permit requirements in the present case has no bearing on the question whether the gear rack was a lawful structure.

The Court of Appeals accepted the finding of the District Court that the protrusion of the gear rack was not a feature affecting navigation and was not required to be shown on plans submitted for approval, since the finding is "supported in the procedures followed by the Army Engineers". The Court refers to the legal principle that the interpretation of statutory requirements adopted by an administrative agency is entitled to great weight and should not be disturbed by judicial action, citing *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325, 77 S. Ct. 84, 21 L. Ed. 862; *United States v. Zucca*, 351 U.S. 91, 76 S. Ct. 671, 100 L. Ed. 964; *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147.

The District Court and the Court of Appeals have misapplied the legal principles enunciated to the facts existent in this aspect of the matter and have failed to recognize and apply the appropriate principles of law. The approach taken

by the Courts below disregards accepted legal standards which this Court and which other Courts of Appeals have repeatedly enunciated.

We do not quarrel with the statement of the Court of Appeals that the burden rests upon a party asserting a statutory fault to establish such fault. However, we insist that this burden was borne when it was proved unequivocally that the construction with protruding gears was not shown upon the plans which the Secretary of War approved. This is so because the bridge and every part of it must be regarded, prima facie, as an illegal obstruction to navigation and the burden rests upon the bridgeowner to show that the structure was constructed in all respects in accordance with plans approved by the Secretary of War. The protruding gear racks depend for the legality of their existence upon the affirmative authority of the Secretary of War to construct them in that manner. The aura of legality for such a structure cannot be derived from the failure of the granting authority to deny the construction or from the failure of the granting authority to demand more "detailed" drawings and specifications than were submitted by the applicant. *The Mayor, etc., of Georgetown v. The Alexandria Canal Co., et al.*, 12 Pet. 97, 9 L. Ed. 1012; *Clement v. Metropolitan West Side El. Ry. Co.* 133 F. 271; *United States v. Norfolk-Berkeley Bridge Corp.*, 29 F. 2d 115.

Where a statute requires approval by a certain governmental official, such requirement cannot be fulfilled as the result of the failure of the official to disapprove. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 65 L. Ed. 847. Approval by the governmental official requires affirmative action and if the applicant desires any feature of a bridge structure to attain legal status it must show such feature on the plans submitted with the application, so that the official charged with approval may consider and act upon it. By

failing to show some feature upon the plans submitted for approval, the applicant takes the risk of the consequential illegality in respect to the feature not included upon the plans.

Every structure which extends into or which crosses a navigable stream is an obstruction to navigation and is illegal unless specifically permitted pursuant to an Act of Congress (*Monongahela Bridge Co. v. United States*, 216 U.S. 177, 54 L. Ed. 435), and Congress may impose such limitations upon the grant as it sees fit (*United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243). In the Act of March 3, 1899, the grant by Congress for the construction of bridges was only limited by the requirement that the plans should be approved by the Chief of Engineers and the Secretary of War and that any deviation therefrom would be illegal. If the construction or any portion of it is not affirmatively shown to be allowed by the approved plans, it is, as a matter of law, illegal. *United States v. Ingram*, 203 F. 2d 91, cert. den. 345 U.S. 995. The burden is upon the bridge owner to show that every part of the construction was permitted under the terms of the Act of Congress and conformed in all respects with the limitations of the grant. *United States v. Norfolk-Berkeley Bridge Corp.*, 29 F. 2d 115.

In giving consideration to the question wherein lies the burden of proving that required permission has been given by a statutory authority, the Courts below have overlooked the accepted principle that claims against the public interest are to be strictly construed against the claimant. Permission required to be given by a public authority is presumed to have been denied unless it can be affirmatively shown that such permission was specifically given. No permission is presumed from negative action and, in fact, the presumption derived from negative action is the denial of permission. Grants for the erection and maintenance of structures upon navigable waters are to be strictly construed so as to give legality

only to that which has been affirmatively permitted by the terms of the grant, the presumption being that the public rights have not be surrendered to a greater extent than may be affirmatively demonstrated by strict construction of the grant. The permittee is considered to have no greater right in respect to the erection and maintenance of the structure than he can show to have been given to him by strictly construing against him the wording of the permit. *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 50 L. Ed. 353; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U.S. 260, 31 L. Ed. 731; *United States v. Norfolk-Berkeley Bridge Corp.*, Supra; *Pennsylvania Ry. Co. v. Baltimore & N. W. Ry. Co.*, 37 F. 129; *Thom v. City of South Amboy*, 236 F. 289; *Texarkana & Ft. S. Ry. Co. v. Parsons*, 74 F. 408.

There is no latitude for speculation in respect to whether permission was granted for the construction of the bridge with the gears protruding from the faces of the piers. The burden is upon the bridge owner to establish unequivocally that affirmative permission was granted for the existence of the particular construction. It is not enough for Petitioner to raise a doubt as to whether it is prohibited, since it is conclusively presumed to be an unauthorized obstruction to navigation unless specifically permitted by the Secretary of War. *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U.S. 260, 31 L. Ed. 731; *Louisville Bridge Co. v. United States*, 242 U.S. 409, 417, 61 L. Ed. 395; *Blair v. Chicago*, 201 U.S. 400, 472, 50 L. Ed. 801; *Pa. R. Co. v. B & N. Y. Ry. Co.*, supra; *Thom v. City of Sout hAmboy*, supra; *Texarkana v. Ft. S. Ry. Co.*, supra.

The correct test to be applied is that it is incumbent on the one claiming under a government grant to make out the rights contended for by a grant clearly and definitely expressed, and he cannot enlarge the grant by resort to equivocal or doubtful provisions or probable inference, and if there be

any basis for reasonable debate between the parties over the meaning of the grant, the content and the scope of the privilege in any of its incidents would have to be read in favor of the grantor and against the grantee. Silence is negation and doubt is fatal to the claim. *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall. 51, 75, 70 U.S. 51, 75; *Northwestern Fert. Co. v. Hyde Park*, 97 U. S. 645. If there is doubt or uncertainty as to whether a right was intended to be conferred, the privilege contended for will be denied. *Blair v. Chicago*, supra; *Louisville Bridge Co. v. United States*, supra.

In its opinion of May 19, 1960, the Court of Appeals has said that it "appears from the testimony following remand that neither the Secretary of War nor the Chief of Engineers had before them the detailed drawings and specifications at the time of the issuance of the permit". The Court here refers to the fact that the drawings and specifications for the use of the contractor in the construction of the bridge were not prepared until after the permit was granted. These later prepared drawings and specifications disclose that the intended construction required the gears to protrude 18 inches beyond the faces of the abutments. If these drawings and specifications had been submitted to and approved by the Secretary of War there undoubtedly would have been an indication of an official approval of this feature of construction. However, the fact that the contract drawings provided for this protrusion which the approved plans did not, leads only to the conclusion that the bridgeowner wilfully prescribed for a feature in the construction which was not in keeping with the plans it was required by the terms of the permit to follow. There is certainly no validity to the suggestion of the Court of Appeals that, since the Secretary of War did not require the permit applicant to submit its "detailed" contract drawings, there resulted an implied approval of such contract drawings despite a deviation therein from those plans which had been submitted with the application. While it may well be true that

the Secretary of War could reasonably have expected the bridgeowner to prepare "detailed" contract and shop drawings for use in construction of the bridge, he would undoubtedly assume that these later drawings would not bring into existence a feature of construction which would constitute a deviation from the approved plans.

There is nothing in the record of this case to show an interpretation by the statutory authority of the requirements of the permit which would result in a conclusion that there was no need for the protruding gear rack to receive approval by the Secretary of War. There is no suggestion from any source that the Secretary of War or the War Department has given any official ruling as to whether a feature such as the protruding gear racks requires or does not require official approval. While there is no doubt that an official ruling by the statutory authority on the subject would be entitled to great weight, there is no basis for assuming that there was such official ruling and most certainly negative action may not be considered the equivalent of a ruling. In this connection, this Court said in *Baltimore & Ohio R. Co. v. Jackson*, Supra:

> It is true that long administrative practice is entitled to great weight, Davis v. Manry, 266 U.S. 401, 405, 69 L. Ed. 350, 352, 45 S. Ct. 163 (1925), but here there has been no expressed administrative determination of the problems. We believe petitioner overspeaks in elevating negative action to positive administrative decision.

We are not sure to what the Court of Appeals refers when it mentions in its opinion of May 19, 1960, "the interpretation placed on the permit and the so-called 'plans' by the Army Engineers". All that has been shown by evidence was that in 1926 the District Engineer reported to the Secretary of War that no violation of the permit was found, but the reasons behind this conclusion and the interpretations adopted in reaching the same are matters of pure speculation. The so-called in-

terpretation is conceived as the result of a series of sweeping presumptions. The reasoning of the District Court seems to be that since the District Engineer reported to the Secretary of War that the bridge had been constructed in accordance with the permit, it must be presumed that the variance from the permit plans in constructing the bridge with protruding gears was not considered by the District Engineer as violative of the permit, from which it is to be further presumed that it was the fixed policy of the Secretary of War not to make any prescription with regard to this feature which in nowise appeared upon the plans he had approved. The nature of this reasoning, heaping presumption on presumption, leads to any number of possible speculations in regard to the intentions of the Secretary of War in granting the permit, and emphasizes the necessity that the Courts should adhere to the oft-repeated rule that speculation cannot be indulged in to determine whether permission has been given where none is shown, and it is therefore presumed that permission was denied. Furthermore, since the District Court's conclusions are based upon the presumption that a public officer has done his duty, such presumption is amply rebutted by the evidence in this case that the District Engineer was not accurate in reporting that the bridge had been constructed in accordance with the permit, since it was definitely established and found as a fact that the bascule spans could be raised to only 71 degrees and overhung the fenders in specific violation of the approved plans.

There was most certainly here wanting any official, contemporaneous, administrative determination to the effect that a protrusion from the bridge abutments does not affect navigation and need not be shown on plans submitted to the Secretary of War for approval. The current opinions of some employees of the War Department to the effect that they do not personally consider the feature as one affecting navigation, can hardly be registered as an established administra-

tive determination and was certainly not contemporaneous. In instances where the Courts have resort to administrative practice for the purpose of determining the meaning of a vague statute or whether the requirements of a regulation thereunder have been met, the administrative practice, to be accepted as guiding and controlling judicial decision, must at least be defined with sufficient certainty to disclose the scope of the administrative decision. Of necessity, the official administrative ruling must have consisted of an actual construction of the point in question and must have been so clear and unambiguous as to demonstrate to the Court its validity and its consistency with the statute or requirement drawn in question. *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 84 L. Ed. 20; *Bennett v. Chicago Portrait Co.*, 285 U.S. 1, 76 L. Ed. 587; *Skidmore v. Swift & Co.*, 328 U.S. 133, 89 L. Ed. 124.

Congress has given legality to the building of bridges over navigable waters only when constructed in accordance with the permit issued by the Secretary of War and the Chief of Engineers. These officials and these officials only are vested with the authority to determine what is legal and what is not legal in respect to bridge construction, and their prerogative is exercised by the issuance of their permit, the terms of which encompass the complete authority for the construction of the bridge. It is not for the Court to say what does or does not affect navigation; nor, for that matter, whether it is permissible to construct a bridge with features that may have an effect only upon "vessels navigating with reasonable care and prudence", which is what the District Court did here, thus imposing its own conception of what standard should be applicable. The view of the District Court, adopted by the Court of Appeals, is similar to a contention advanced by the bridgeowner in *United States v. Ingram*, 203 F. 2d 91, cert. den. 345 U.S. 995, 97 L. Ed. 1402, which was discarded as unsound by the Court of Appeals for the Eighth

Circuit. There the plans which had been approved by the Chief of Engineers and the Secretary of War provided for a railroad bridge, with a projecting structure on each side as a roadway, and the bridgeowner undertook to dismantle a portion of the superstructure for roadway use without permission of the Chief of Engineers and the Secretary of War. The bridgeowner contended that the change would "not affect the location or affect the obstructive nature of the bridge for purposes of navigation" and hence did not require the approval of the Chief of Engineers and the Secretary of War, with which contention the District Court agreed. The Court of Appeals reversed the District Court, holding that the provisions of the statute were absolute in making it unlawful to deviate from the plans approved by the Chief of Engineers and the Secretary of War without receiving their approval for modification. The following expressions of the Court of Appeals in the *Ingram* case are particularly relevant here:

> Whatever terms Congress has imposed on any granted bridge authority must therefore fundamentally be regarded as matters of legislative policy, having their source and scope in the absolute right of Congress to do anything in this plenary field that it chooses, and not inherently subject to any judicial measuring or checking as a narrow question of navigation obstruction by legal standard. Congress, as we have said, does not have to conform its actions with respect to the *building, maintaining, changing* or removing of structures in navigable waters to any extraneously appraisable test or standard of navigation obstruction. And no basis can exist for the courts to assume to translate what Congress had done into such a conformation and so to subject the terms of its grant to judicial administration through the question of obstruction—which was what the court did here, in considering whether the dismantling would in fact involve or would result in any obstruction to navigation.

and in holding on that basis that no approval of the Secretary of War was necessary as authority for the undertaking—unless the statute contains clear indication of a legislative intent to allow such a judicial intrusion or unless a disabling ambiguity exists in it of such a nature as to compel the intrusion.

* * * *

The only right therefore that existed *to build* the Hanrahan Bridge and the only right that existed to change it was on the basis of the same unqualified and unequivocal condition, that there had to be a submission to and approval by the Secretary of War of the plans. Judicial visa on the question of obstruction could, as we have suggested, no more suffice as a warrant for changing the bridge structure *than it would have done for erecting it*. The identicalness of the language used and of the prerogative involved leaves no basis for any legal differentiation in the scope of the legislative condition between the two undertakings. And since both the terms and the field of the condition were plain and absolute, there could exist no basis for engaging in any judicial interpretation of it *as to either situation*. But even if there had existed any basis for reasonable debate between the parties over the meaning of the condition, the content and scope of the grant of privilege in any of its incidents would have had to be read "most strongly in favor of the grantor" and not to effect a liberalization of the privilege of the grantee. Hannibal & St. J. R. Co. v. Missouri River Packet Co., 125 U.S. 260, 271, 8 S. Ct. 874, 880, 1 L. Ed. 71; in re Birmingham Bridge, 3 Wall. 51, 75, 70 U.S. 51, 75, 18 L. Ed. 137. (Emphasis added)

There being evidence in the record that it would be a matter of judgment whether the protruding gears would affect navigation and the evidence in the record disclosing a reason-

able, rational basis for the exercise of the absolute judgment of the Secretary of War and the Chief of Engineers on the subject, it must be concluded that the Secretary of War and the Chief of Engineers could have considered that the protruding gears would affect navigation if they had known that this feature of construction was intended. Since it was solely within the determination of the officials designated by statute as to whether any feature of construction would affect navigation or was permissible, there is no legal justification for the District Court's conclusion that the feature of construction with protruding gears would not affect navigation and was permitted. The bridgeowner, by undertaking to make its own determination of what would affect navigation, assumed the risk of illegality in the bridge construction by reason of not requesting the statutory officials to give sanction to the protruding gear feature and this construction, without permission, was made at its peril. The bridgeowner has not borne the burden resting on it of establishing unequivocally that affirmative permission was granted for the protrusion of the gear racks. *United States v. Ingram*, Supra.

Since the protrusion of the gear racks was illegal and since it is clear from the evidence that had they not protruded they could not have been struck by the vessel, it must follow that by application of the *Pennsylvania* rule (The Pennsylvania, 19 Wall. 125, 86 U.S. 125, 22 L. Ed. 148), this violation of law caused or contributed to the damages. The Highway Department has based its right to recover damages upon the theory that these damages resulted from the striking of the gears by the negligent operation of the vessel and, if this theory is accepted, then the damages must be divided.

3. *The Court of Appeals has departed from accepted legal principles in refusing to hold the bridgeowner at fault in failing to construct and maintain an adequate fendering system and one in keeping with the War Department permit.*

The requirements of the War Department permit were that a Western fendering system consisting of 17 pilings in a straight line parallel to the pier should be located 2½ feet channelward of the pier. The uncontradicted testimony developed that there were only 9 piles in this fender which had not been so completely or substantially eaten away by marine life that they did no more than hang upon the strakes and provided no resisting force, and that these remaining 9 piles had so completely served their useful life that they had very little, if any, effect in performing the function for which they were intended. (Appellee's Appendix No. 7604, pp. 237, 238, 244). It was also established that these pilings were situated 3½ feet channelward from the Western pier. (25a-E).

The Chief Bridge Engineer for the Highway Department testified that the only function of the fendering system along the piers was to keep passing vessels from striking the concrete abutments and that this function had been adequately performed by the Western fender system in the collision under consideration. (Appellants' Appendix No. 7604, pp 88, 89). This engineer did not conceive it to be the function of the fender to prevent a passing vessel from striking the overhanging bascule span or the protruding gear rack.

The evidence shows that a fendering system could readily have been constructed and maintained so as to prevent passing vessels from striking the overhanging bascule span and the gear racks. It has been pointed out by the shipowner that if there had been 17 sound pilings, as required by the War Department permit, there would probably have been no contact with the gear rack. This contention was apparently accepted by the Court of Appeals in its opinion of November 13, 1958, when it said (Appendix p. 10a).

> • • • But we do not feel that the resistence offered by the fendering system could not possibly have caused the ship to deviate to some extent, thus enabling it to avoid

striking the protruding gear rack. The force of this argument leads us to the inevitable conclusion that the Appellee has not carried the admittedly heavy burden of establishing that its statutory fault could not have, under the "reasonable possibility" test, contributed to the accident and resulting damages.

After rehearing in the District Court and without any new evidence on the subject of the fender system, the Court of Appeals disposed of this subject in its opinion of May 19, 1960, (Appendix, p. 21a) as follows:

> Appellant's final contention is that the fender system on the west side of the draw was located about one foot further channelward than the permit indicated. The District Court effectively disposed of this argument by stating that the force of the impact was such that the fender system, wherever placed, could not have prevented contact with the gear rack. We must assume that, on remand, the trial court concluded that the vessel would not have deviated and thus avoided striking the gear rack, irrespective of the condition of the fendering system on the western side.

In stating that it was the shipowner's contention that the location of the fender system one foot further channelward than the permit indicated, the Court of Appeals has completely misapprehended the shipowner's contention. The shipowner has never contended and does not now contend that the mislocation of the fender system by one foot channelward was in any way a contributing cause of the accident. However, the more serious error of the Court of Appeals arises from its assumption that the trial court concluded that the vessel would not have deviated and thus avoided striking the gear rack, irrespective of the condition or placement of the fendering system on the western side.

The extent of the force of the impact with the fender system and what force of impact a properly constructed and maintained fendering system would have resisted are matters of pure speculation. There is testimony in the record to support a conclusion that the vessel would have deviated and avoided striking the gear rack if the fenders had been constructed for the purpose of preventing such contact, or if they had been maintained by sound piling. There was unrefuted testimony that by the simple means of installing vertical timbers on the inside line of the pilings the vessel would have been held off from the abutment a sufficient distance to avoid striking the gear racks (Appellants' Appendix No. 7604, pp 271, 272). There is no testimony to justify the conclusion that collision with the bridge structure could not have been prevented by construction of a more substantial fendering system or by proper maintenance of the fendering system as originally installed.

In dealing with the extent of the impact from the vessel, the District Court has considered that the force was one which was not to be reasonably anticipated. The testimony on this subject is that an impact to the fendering system was given from the port side of the hull as the vessel passed through the draw opening. The vessel, in passing through the draw had the right to come up against the fenders, and it was the duty of the bridgeowner to anticipate that vessels would scrape along the fenders. The bridgeowner knows what the Secretary of War and the Courts know, that vessels even under the most favorable conditions do not move with absolute precision, and it is to be expected that they will sometimes scrape along the fender while passing through. *Southern Transp. Co. v. Phila. B. & W. R. Co.*, 196 F. 548, aff'd. (C.C.A. 4, 1913) 205 F. 732; *City of Milwaukee v. Kensington S. S. Co.*, (C.C.A. 7, 1912) 199 F. 109; *Pennsylvania R. Co. v. The Buchanan Boys*, (C.C.A. 2, 1946) 155 F. (2d) 285; *United States v. Norfolk-Berkeley Bridge Co.*, supra.

Speculation as to whether a properly constructed and maintained fendering system would or would not have prevented a collision with the overhanging bascule span or with the gear racks may be indulged in to bring about either result. If there had been a sufficient number of sound pilings, as required by the War Department permit, an assumption is readily arrived at that collision between the vessel and the gear rack would have been prevented. There is no way to measure the impact in order to say conclusively what would have been the result if the fendering had been otherwise than it, in fact, was. The evidence does not measure up to the requirement that a statutory violator must conclusively establish that the violation could not possibly have contributed to the disaster. *The Pennsylvania*, supra

The Courts have repeatedly held that a bridgeowner has the duty to provide adequate protective fendering to prevent passing vessels from coming into collision with protruding structures in draw openings. The situations considered in *City of Milwaukee v. Kensington S. S. Co.*, (C.C.A. 7, 1912) 199 F. 109, and in *Southern Transp. Co. v. Philadelphia B. & W. R. Co.*, (D.C. Md., 1912), 196 F. 548, Aff'd. 205 F. 732. are strikingly similar to the situation in the case at bar.

In *City of Milwaukee v. Kensington S. C. Co.*, Supra, a vessel passing through a draw bridge struck a ledge protruding from the abutment, causing damage to the vessel's hull. The original plans for the bridge called for protective piling but instead the abutment was protected by timbers which had rotted away and left the protruding ledge entirely unprotected. The Court decided that the bridgeowner was at fault in causing the damage to the vessel, and said, *inter alia*:

> The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the City to put them there and there keep them. Failure to do this was negligence, the proximate cause

of the injury. The bridge itself was an obstruction to navigation, permitted only to serve commerce on land. Clearly it was the duty of the City to make it as safe as was reasonably possible.

In *Southern Transp. Co. v. Philadelphia B. & W. R. Co.*, supra, a tug with tow passing through a draw opening in a bridge over the Potomac River took a sheer and the bow of the barge struck the fender piling. The piling was so poorly constructed and in such bad condition of repair that it did not sufficiently fend the barge from the pier and caused it to strike an iron-shod timber which projected 12 inches from the pier. It was the contention of the bridgeowner that, having obtained permission of Congress to erect the bridge, it was the business of passing vessels to keep away from the piers. The bridgeowner was held at fault and the Court stated, *inter alia*, as follows:

> The respondent's witnesses say that had it not been for the fender piling collisions with this particular pier would have been not uncommon. Properly placed and maintained piling will usually keep vessels from coming into contact with piers and abutments of draw bridges, and will greatly reduce the destructive effects of many of the collisions which cannot be altogether prevented. Ordinarily such protection can easily be given and at comparatively small cost. * * * The owner of such a bridge has no right unnecessarily to make it or its approaches dangerous. * * *.
>
> The projecting timber did the damage. It made the bridge more perilous to shipping. The libel expressly said that this timber was the cause of the accident. Respondent examined a number of witnesses more or less familiar with the bridge. It did not attempt to show why the timber was where it was, or that its being where it was served any purpose. Had it been a necessary feature of

> the bridge construction, it was still a peril not obvious to those rightfully using the river. Whatever its purpose, it was the duty of the respondent to protect vessels from the danger of coming into contact with it. Vessel Owners Towing Ass'n. v. Wilson, 63 Fed. 626.
>
> Respondent was required to take reasonable precautions to keep vessels from coming into contact with it. If necessary, it would have been harmless if properly protected. * * *

To the same effect are the decisions in *Pennsylvania R. Co. v. The Buchanan Boys* (C.C.A. 2, 1946), 155 F. 2d 285; *United States v. Norfolk-Berkeley Bridge Co.*, Supra; *Vessel Owners Towing Co. v. Wilson* (C.C.A. 7, 1894), 63 F. 626.

The finding of the District Court and its acceptance by the Court of Appeals that "any fault in the construction, maintenance and operation of the bridge and its fenders did not contribute to, and could not possibly have contributed to the collision or the damages resulting therefrom" overlooks the fact that the collision could well have been prevented if the bridgeowner had constructed and maintained a fendering system in line with the point of extreme overhang of the bascule span as required by the War Department permit. The statutory violation of the bridgeowner in maintaining a maximum bascule span elevation at 71 degrees so that the western span overhung its fenders by 14.3 feet resulted in the violation of maintaining a fendering system in disharmony with the requirement of the permit that the fenders be in alignment with the raised extension of the span. The implication in the conclusion of the Courts below is that the navigational opening is to be determined simply by a mathematical measurement between fendering systems, regardless of the diminution of the opening above them due to an illegal extension of the bascule spans, and this does violence to the safety requirements of the permit plan which prescribes a clear opening protected by

fenders (Appellants' Appendix No. 8023, pp. 48, 129). The opening provided by the bridge was only 107.3 feet and the failure to maintain protective fendering for that width is violative of the permit. The obvious danger to the bridge and to passing vessels occasioned by the spans extending into the draw opening beyond the protective piling was certainly considered by the statutory permit authorities in requiring protective fendering in line with the overhang of the spans. The bridgeowner cannot escape its responsibility for violating the requirements of the permit by simply providing a 138 foot clearance at the waterline and obstructing the opening above them to 107.3 feet without protecting by proper fenders the illegal obstruction.

Under the circumstances, it was the duty of the bridgeowner to either eliminate its illegal protrusions and obstructions or to construct and maintain an adequate fendering system which would fend a passing vessel from making contact with the bridge's illegal protrusions. Even under the most favorable conditions, vessels do not move with absolute precision, and it is to be expected that they will sometimes scrape against the fenders of a bridge opening. *Southern Transp. Co. v. Philadelphia B. & W. R. Co.*, supra. Despite the findings of the District Court, the evidence renders inevitable the conclusion that properly constructed and maintained fender pilings in compliance with the requirements of the War Department permit could possibly, if not probably, have prevented the collision and consequent damage. Consequently, the burden imposed upon a statutory violator of showing that the violation could not have contributed to the disaster, has not been met by the bridgeowner in the case at bar and the bridgeowner must be held at fault in contributing to the damage. *The Pennsylvania*, supra.

4. *The Courts below have erroneously failed to conclude that the damages to the bridge and the vessel were caused by the*

statutory violation of the bridgeowner in failing promptly to open the draw on signal.

The right of maritime navigation upon the navigable waters of the United States is paramount and a bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to land commerce. Such a structure must be so maintained and operated that navigation upon the waters of the stream may not be impeded more than is absolutely necessary. The bridge owner is required to so construct and maintain the bridge that it shall readily admit the passage of craft and must have in charge at all times competent persons to open the bridge for the passage of vessels. *Clement v. Metropolitan West Side El. Ry. Co.* (CCA 7, 1903) 123 F. 271.

The law requires that the bridgeowner shall provide its drawbridge with "the necessary tenders and the proper mechanical appliances for the safe, prompt, and efficient opening of the draw for the passage of vessels." The law also requires that the draw of a bridge across a navigable waterway "shall be opened with the least possible delay upon receiving" a signal of three blasts from a ship's whistle, and further requires that if the bridge cannot be opened immediately "the drawtender shall reply by four or more short, distinct blasts of a whitsle or horn, by four or more calls through a megaphone, or by four or more loud and distinct strokes of a bell (danger signal)" (Regulations prescribed by the Secretary of the Army, Code of Federal Regulations, Sec. 203-210, pursuant to U.S.C.A. Title 33, Sec. 499).

The vessel first gave the prescribed signal for the bridge to open when more than a mile from the bridge (Appellants' Appendix No. 7604, pp. 77, 104, 146, 184, 202), signalled a second time when approximately three-quarters of a mile from the bridge (Appellants' Appendix No. 7604, pp. 105, 137, 186) and signalled a third time when less than one-half mile

from the bridge (Appellants' Appendix No. 7604, pp. 78, 82, 105, 106, 147, 169, 174, 176, 187). The tug, preceding the vessel, blew three series of blasts (Appellants' Appendix No. 7604, pp. 61, 175), the last series when actually up to the bridge (Appellants' Appendix No. 7604, pp. 61, 62). No responsive signal was given by the bridgetender until after the vessel and the tug had blown for the third time (Appellants' Appendix No. 7604, pp. 78, 79, 125, 126). The result of the failure of the bridge to open promptly upon signal and the failure of the bridgetender to give a responsive signal (Appellants' Appendix No. 7604, p. 137) caused the vessel to materially slow its progress (Appellants' Appendix No. 7604, pp. 104, 152, 185) so that its speed through the water was reduced from approximately 6 or 7 knots (Appellants' Appendix, No. 7604, p. 185), when the first signal was given, to approximately 2 knots at the time the bridge began to open (Appellants' Appendix No. 7604, pp. 107, 187) and caused the tug to come to a complete stop at the bridge and there await its opening (Appellants' Appendix No. 7604, pp. 62, 80, 81, 82, 175).

The bridgeowner's drawtender testified that he heard the signals of the vessel and the tug. He waited, but gave no explanation for any necessity whatever to delay opening the draw. He also admitted that he deliberately violated the regulations. (Appellants' Appendix No. 7604, pp. 80, 82).

Those in charge of the vessel testified that the vessel was able to maintain steerageway despite the slowing of its speed through the water (Appellants' Appendix No. 7604, pp. 107, 109, 186), that when the bridge had opened the vessel was then in a proper position to go through the opening (Appellants' Appendix No. 7604, pp. 112, 118, 142, 189) and that they then had every reason to believe that sufficient momentum could be developed safely to make the passage through the opening (Appellants' Appendix No. 7604, pp. 113, 118,

144, 189). The vessel was able to attain some increase of speed after the bridge opened but the maximum of 4 or 5 knots was not attained until she was entering the opening (Appellants' Appendix No. 7604, pp. 108, 153, 194). It was stated that in approaching the draw opening the slow speed of the vessel did not give it sufficient momentum to come around to the right as quickly as was desired but that it was not until the bow of the vessel had entered the opening that it became apparent that the ship was crabbing in a westwardly direction and would scrape along the fender pilings, at which time nothing could be done to avoid this contact (Appellants' Appendix No. 7604, pp. 113, 120, 148, 149, 189, 190).

The master of the vessel testified that when the draw of the bridge was opened the vessel had sufficient steerageway but insufficient maneuverability and explained that "steerageway" means the ability to maintain a general course in a general direction in the open stream, whereas "maneuverability" means the ability to change course and to arrive at a particular point at a particular time (Appellants' Appendix No. 7604, pp. 119, 120, 121, 133, 195). He further stated that while the rudder or engine may always be used to keep the ship in steerageway, which is "to hold her head up—to pick her up as she falls off one way or the other" (Appellants' Appendix No. 7604, pp. 105, 109, 119, 187 and Appellee's Appendix No. 7604, pp. 288, 289), whereas momentum is required to maneuver (Appellants' Appendix No. 7604, pp. 119, 120, 121, 133, 152, 189, 194, 195, 223).

Since the bridge was built diagonally across the channel of the river from Southeast to Northwest, in proceeding up the river from South to North, the proper maneuver in approaching the draw opening was to favor the westwardly side of the channel and then turn right in a northeastwardly direction to proceed through the opening, parallel to the fenders and the abutments (Appellants' Appendix No. 7604, p. 112,

Appellee's Appendix No. 7604, pp. 3, 91, 92, 346 and Appendix to Appellants' Reply Brief No. 7604, pp. 7-a, 11-a, 15-a).

A vessel approaching a bridge and giving the proper signal for the bridge to open has the right to assume that the bridge will be timely opened for the passage of the vessel and is not bound to heave to. *Clement v. Metropolitan West Side El. Ry Co.*, (C.C.A. 7, 1903) 123 F. 271. If the bridge cannot be opened for prompt passage of the vessel, it is the duty of the bridge operator to actively warn the vessel that the bridge will not or cannot be opened. *Clement v. Metropolitan West Side El. Ry. Co.*, supra; *Monroe v. City of Chicago* (C.C.A. 7, 1912) 194 F. 936; *City of Chicago v. Chicago Transp. Co.* (C.C.A. 7, 1915) 222 F. 238, cert. den. 238 U.S. 626; *The Majestic* (C.C.A. 4, 1936) 80 F. 2d 879. Failure either promptly to open the draw or to give prompt notice that the failure or delay is unavoidable raises a presumption of negligence on the part of the bridgeowner in causing any subsequent collision. *Clement v. Metropolitan West Side El. Ry. Co.*, supra; *Great Lakes Towing Co. v. Massaba S. S. Co.* (C.C.A. 6, 1916) 237 F. 577; *Southern Transp. Co. v. City of New York* (S. D. N. Y. 1950) 98 F. Supp. 967. Failure of a bridgetender to give any responsible signal or promptly to open the draw is a causative act of negligence on the part of the bridgeowner. *Pennsylvania R. Co. v. Central R. Co. of N. J.* (S. D. N. Y. 1892) 59 F. 190.

Having given proper signals for the bridge to open and having received no warning of inability to open, it was permissible for the vessel to proceed at slow speed until such time as it appeared, either by warning or in a reasonable view of the situation, that the bridge would not be opened. *Clement v. Metropolitan West Side El. Ry. Co.*, supra. If it thereafter became necessary for the vessel to take some preventative action in order to avoid collision, those in charge of the vessel were held only to the exercise of reasonable judgment in

regard to the action to be taken under the existing circumstances and were only required to take such action as a reasonably prudent and skillful navigator might well have taken in an emergency. An unfavorable result flowing from the imperfect action taken would not bring about an imputation of negligence. *Wilmington R. Bridge Co. v. Franco-Ottoman Shipping Co.*, (C.C.A. 4, 1919) 259 F. 166. Furthermore, if there were any errors of judgment in navigation by the master in not knowing that the vessel would act as it did and such errors of judgment were occasioned when the vessel was placed in an emergency or dilemma created by the bridgeowner, the bridgeowner cannot be excused or its liability lessened for the damage resulting. *Monroe v. City of Chicago*, supra; *City of Cleveland v. McIver*, (C.C.A. 6, 1940) 109 F. 69; *The Charles Mulford*, (S. D. N. Y., 1916) 157 F. 131.

When the bridge became fully opened the vessel was about one-third of a mile or three and one-half ship's lengths from the bridge and it was then the opinion of those in charge that she would successfully negotiate the passage without collision. The alternative was to attempt to stop the vessel by reversing her engine and dropping her anchor, which action in the narrow channel along which she was proceeding might have caused the vessel either to collide with the other structures or vessels in the stream, or to have run aground. (Appellants' Appendix No. 7604, pp. 118, 153, 154, 165, 166, 212, 213, 225). Another possibility was that if the anchors did not hold, the action of the wind might cause the vessel to run headon into the bridge on either side of the opening, endangering not only the bridge sturctures but also the lives and property of all persons then upon the bridge (Appellants' Appendix No. 7604, pp. 213, 225, 226). Under these conditions, it cannot be said that those in charge of the vessel exercised bad judgment in attempting to proceed through the opening and there cannot be any resulting imputation of negligence flowing from the fact that the transit through the opening

was not completely successful. Moreover, even if it could be said that those in charge of the vessel were guilty of an error of judgment in proceeding, it necessarily follows that such error of judgment was occasioned by the vessel being placed in a situation of emergency, which situation was created by the bridgeowner's illegal failure to open the bridge with promptness and to give signal of its intentions.

The Court of Appeals disposed of the matter of the delay in opening the draw in relation to the subsequent collision of the vessel with the bridge, as follows (Appendix p. 5a, 6a):

> Appellant strenuously urges that the delay in opening the bridge was the cause of the collision. This contention is sufficiently answered by the ship's personnel who unanimously affirmed that the ship had perfect steerageway and control at 2 knots or 3 knots while she was well downstream and "killing time" awaiting the opening of the bridge. The captain conceded that, irrespective of the alleged delay, the vessel was in good position to go through the bridge. The Pilot and third mate testified substantially to the same effect. The evidence of appellant's own witnesses proves conclusively that the delay, if any, in opening the bridge had no relation to the collision.

In thus construing the evidence, while the Court has rightly arrived at the conclusion that the vessel was in good position to go through the bridge opening in spite of the delay, it has ignored the uncontradicted testimony that the lack of momentum of the vessel, due entirely to the delay in opening the bridge, impaired the vessel's maneuverability for the necessary transit through the opening. Apparently, the Court assumed that the term "steerageway" was the same as the term "maneuverability" and failed to distinguish between the two. Neither of the Courts below have made any reference to the lack of maneuverability of the vessel caused by the lossage of momentum due to the reduction in speed consequent to the

delay in opening the draw. These facts definitely established that the originating cause of the collision was the fault of the bridgeowner in failing to perform its statutory obligations to open the bridge promptly upon signal and to respond to the vessel's signals. The bridgeowner should be adjudged liable for all consequential damages flowing from these faults.

Even if it be assumed, however, that there was some degree of faulty navigation on the part of those in charge of the vessel, the bridgeowner must be held in equal blame by reason of the statutory violations regarding the delay in opening the draw and giving a responsive signal. The burden was upon the bridgeowner to prove unequivocally that these statutory violations could not possibly have contributed to the disaster. There was no question but that there was delay in opening the bridge and that as a consequence, the ship's speed was substantially reduced and its momentum impaired. A review of the entire record is convincing that there has not been excluded the possibility that these statutory violations could have contributed to the result. In this respect, the bridgeowner has further failed to meet the test of the rule expressed by this Court in *The Pennsylvania,* supra.

5. *Summary*

For all of the reasons discussed above, we believe that this cause merits review by this Court. The Courts below have construed basic legal principles of admiralty law in such a way as to make them meaningless and ineffectual and their future application in doubt. If the decision of the Courts below should stand, there would be no certainty in regard to the obligations of statutory violators respecting the establishment that their violations could not have contributed to a marine collision.

While at first blush it seems likely that a vessel moving in a navigable stream must have been improperly maneuvered

to collide with a fixed object such as a bridge, this does not obviate the necessity to make further inquiry in order to determine whether compliance by the bridgeowner with statutory requirements could possibly have caused the collision to be avoided or the effects to be otherwise. It is certain that the ship violated no statutory requirement and it is equally certain that the bridgeowner did not comply with the provisions of statutes in the following particulars:

1. The bridge was constructed and maintained so that the bascule spans could not be raised to 82 degrees as required by the War Department permit and would overhang the fenders in violation of the permit.

2. The gear racks were so constructed as to protrude 18 inches outward from the abutments at the draw opening without such construction having been approved by the Secretary of War.

3. The fenders were not constructed and maintained at a line coincident with the furthest extension of the bridge structure.

4. The fendering system was maintained in an inadequate condition to comply with approved plans and for the protection of the bridge structure from collision with passing vessels.

5. The drawtender deliberately failed to open the movable spans promptly upon signal from the ship.

6. The drawtender wilfully failed to give an immediate answering signal to the vessel's signal for opening the draw.

CONCLUSION

We submit that a review of the record will be convincing that the bridgeowner has not established that one or more of these violations could not have contributed to the disaster or

that the resulting damages would necessarily have been the same if the statutory requirements had been met. Misconceptions by the Courts below in respect to a federal statute and to the requirements of the rule enunciated by this Court in *The Pennsylvania*, supra, and in respect to the extent of appellate review in a situation such as here presented, coupled with disregarding applicable federal decisions, have brought about an erroneous result which should be corrected by this Court in order to prevent an injustice in this case and to clarify the improper interpretations of legal principles which will profoundly affect future litigants in admiralty actions.

Respectfully submitted,

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APPENDIX

In The Supreme Court of The United States

October Term, 1959

No.

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

OPINION AND DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED NOVEMBER 13, 1958 (CASE NO. 7604)

HOFFMAN, District Judge:

OPINION

This is an appeal in admiralty from a decree of the district court holding the appellant vessel FORT FETTERMAN solely responsible for damages occasioned on October 5, 1955, by the collapse of a bascule span on a highway bridge owned and operated by appellee, when the FORT FETTERMAN collided with the bridge which spans the Ashley River and connects the City of Charleston with St. Andrews Parish in the State of South Carolina.

The district judge filed extensive findings of facts and conclusions of law holding that the negligent navigation of the

vessel constituted the sole proximate cause of the collision and damages flowing therefrom. The shipowner's cross-libel seeking recovery for damages to the vessel was dismissed. See 155 F. Supp. 359. If these findings of fact are supported by credible testimony, it is well settled that they are not to be disturbed unless found to be clearly erroneous. This principle is particularly applicable where, as in this case, the trial judge heard the witnesses and observed their demeanor on the witness stand. *The Frances*, 4 Cir., 101 F. (2d) 30; *Hodges v. Standard Oil Co. of New Jersey*, 4 Cir., 123 F. (2d) 362; *The Nichiyo Maru*, 4 Cir., 89 F. (2d) 539; *Jordan v. Texas Co.*, 4 Cir., 123 F. (2d) 614. We are called upon to examine the record to ascertain whether the factual situation reveals manifest error on the part of the district court. Mere expressions of disagreement do not justify a reversal of such findings of fact if credible evidence exists to support the view of the trial judge.

The bridge was constructed during the years 1923-25, pursuant to authorization by the South Carolina Legislature (30 S.C. Stat. 1072), but *not* in accordance with the plans attached to and made a part of the permit issued on May 23, 1923, by the War Department. There were, for reasons not disclosed by the evidence, material variances between the approved plans and actual construction. For example, the abutments supporting the bascule spans were required to be at a distance of 146 feet apart with no stated provision for tolerance with respect to protrusion of gears, gear rack, machinery, etc., from the outward vertical faces of the abutments. The bascule spans, when fully open, were required to be raised to an angle of 82 degrees, making the extreme extension of the spans in line with the fender systems and a distance of 138 feet apart. Actually, the bridge as constructed permitted the bascule spans to be raised to a maximum angle of only 71 degrees; the extreme extension of the spans, when raised to this maximum

degree, were 107.5 feet apart and overhung the fender system; the gears used to raise the bascule spans extended about 18 inches beyond the outer faces of the abutments; the fendering system on the western side of the opening was approximately 5 feet from the outer face of the abutment, with the bascule span, when fully open, overhanging the fenders by 14.3 feet; and the outer face of the western fender being approximately 3-½ feet from the outer limits of the protruding gears. These substantial variances must be considered in light of the provisions of 33 U.S.C., §491, 34 Stat. 84, to the effect that where Congress grants authority to construct and maintain a bridge over navigable waters of the United States, "such bridge shall not be built or commenced until the plans and specifications for its construction, . . . have been submitted to the Secretary of the Army and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications . . .; and when the plans for any bridge to be constructed . . . , have been approved by the Chief of Engineers and by the Secretary of the Army it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army".

Jurisdiction with respect to obstructions over navigable streams within the United States is, of course, vested solely in the Government. Public policy dictates that there shall be no material deviation from the plans and specifications approved by the War Department. As was said in *United States v. Ingram*, 8 Cir., 203 F. (2d) 91, 95, cert. den. 345 U. S. 995:

> "Here, there is neither indication nor ambiguity in the statute as a warrant for any judicial dealing with bridge modification, any more than with bridge erection, as a question of obstruction to navigation . . . Deviation from

> 'any plans . . . approved', except upon the basis prescribed in the grant constituted a violation of the statute, whether done during or done after the building of the bridge."

While we do not hold that an inconsequential deviation constitutes such a violation of the statute as to preclude the offending party from any right of recovery, it is manifestly clear that the deviations with respect to the Ashley River bridge were substantial and constituted a violation of the statute. To hold otherwise would render the statute meaningless. Nor are we impressed with the fact that the violations have continued for a period of approximately thirty years without accident or complaint. What, then, is the effect of such violations as applied to the facts of this case?

The FORT FETTERMAN is a T-2 tanker, having an overall length of 523' 6", a beam of 68' 2", and measurement from main deck to keel of 39'. Her gross tonnage is 10,457; her hull is steel; and she is powered by a turbo-electric drive with a single screw. On the afternoon of October 4, 1955, the vessel arrived in the Charleston harbor and anchored in the Cooper River. The cargo of creosote and tar was to be discharged at the Koppers Company dock, which required passage up the Ashley River through the bridge in question. In accordance with directions from the Charleston Pilots' Association, a portion of the cargo was pumped into barges to lighten the vessel to a draft not exceeding 15 feet. This operation was concluded at 3:30 A.M. on October 5, at which time the ship drew 14' 10" fore and aft, resulting 24' 3" of freeboard, with 6' of her single propeller and 7' of her rudder out of the water.

At 8:20 A.M. the tug FORT EDISTO came alongside the vessel, but did not tie up to same. Apparently it was contemplated that the tug would precede the FORT FETTER-

MAN on its passage up the Ashley River for the purpose of notifying the bridge to open in time for the vessel's passage and to assist in docking. A Pilot and an Apprentice Pilot from the Charleston Pilots' Association boarded the ship at 8:43 A.M., and at 8:55 A.M. the FORT FETTERMAN weighed anchor and proceeded up the Ashley River toward the bridge with the tug leading the way.

We have no difficulty in agreeing with the district court as to its conclusions of improper navigation on the part of the Pilot and ship's officers of the appellant vessel. There was a clear 110-foot channel running diagonally through the draw of the bridge, opening at an angle of 20 degrees measured counter-clockwise from a perpendicular to the roadway centerline. Slack water tide was undoubtedly preferable to a flood tide or current in negotiating passage through the bridge of a vessel the size of the FORT FETTERMAN. The ship endeavored to pass through the bridge approximately 45 minutes prior to the recommended time. The wind was from the east at 16 miles per hour, striking the starboard beam of the ship as she approached the bridge. At a distance of approximately 900 yards south of the bridge the vessel passed the Black Can Buoy but, even prior thereto, the Pilot and ship's personnel were cognizant of the fact that the wind and tide were having some effect on the handling of the FORT FETTERMAN and concluded that she had to be held up to some extent into the wind. Despite such knowledge, neither the Pilot nor the ship's officers exerted any particular effort to determine what precise effect, if any, the wind and tide were having on the speed or the set and drift of the vessel, although they well knew that it would be necessary to negotiate a passage of a 68-foot beam vessel through a charted bridge opening of 110 feet. Success in the execution of this passage required care which was obviously absent in this case.

Appellant strenuously urges that the delay in opening the

bridge was the cause of the collision. This contention is sufficiently answered by the ship's personnel who unanimously affirmed that the ship had perfect steerageway and control at 2 knots or 3 knots while she was well downstream and "killing time" awaiting the opening of the bridge. The captain conceded that, irrespective of the alleged delay, the vessel was in good position to go through the bridge. The Pilot and third mate testified substantially to the same effect. The evidence of appellant's own witnesses proves conclusively that the delay, if any, in opening the bridge had no relation to the collision.

At about the time the vessel passed the Black Can Buoy, she veered off to the leeward to get into position to come to her right in order to line up with the draw opening which was on a 20 degree angle to the channel and river. This placed the beam of the ship directly to the east wind, and the force of the current at a 20 degree angle on the starboard quarter, rather than astern as it previously had been. Approaching the draw from the leeward side contrary to the accepted rule among mariners, the wind and current undoubtedly had the effect of placing the vessel too far to the lee shore. To offset this action, she was given a full right rudder and her speed increased progressively from "Slow Ahead" to "Full Ahead", in an effort to place the vessel to windward and thereby enter the draw opening. This movement brought the ship's bow to the starboard to such an extent that the bow entered and went through the draw opening, but the stern was still too far to leeward and the vessel "crabbed" into the southwest corner of the fender system and bridge, striking the same with a forward and sideway movement at 9:39 A.M., with the port side of the ship making contact with the west side of the bridge.

The initial contact was about 135 feet aft from the stern of the vessel at a point approximately 40 feet forward of the fashion plate and superstructure. The learned district judge

found as a fact that this contact was with the gear rack on the downstream girder of the western bascule, which gear rack was in an illegal position. It is on this finding that the court concluded the "sole proximate cause" of the collision rested upon appellant, as this initial blow broke the gear rack and bent it in an upstream direction. In effect, the lower court held that the resulting damage was inevitable after this initial contact as the downstream girder was caused to fall several degrees so that it dropped in the path of the fashion plate and superstructure. While the evidence on this phase of the case is in sharp conflict, we are willing to accept as a fact that the gear rack was broken and bent in the manner described, but we are unable to agree with the lower court that this initial impact was the sole proximate cause of the collision and resulting damage as the presence of the gears constituted a violation of the permit in protruding beyond the face of the abutment.

With the bascule spans at a maximum elevation of 71 degrees, if the vessel had proceeded through parallel and immediately contiguous to the west fender line, where it admittedly had the right to be, the parties concede that the top of the ship's superstructure on the port side would have come in contact with the uppermost point of the raised bascule. The district judge held that this fault on the part of the bridge never became an operative factor as the effective damage had already taken place and, furthermore, that such damage, if incurred, would have been speculative and negligible.

It is the legal presumptions and conclusions of the lower court with which we must disagree. It is said by the district judge that any deviation from the approved War Department permit should not be considered unless such deviation was the proximate cause of, or contributed to, the collision and damages. We believe that the factual situation here presented calls for the clear application of the rule as stated in *The*

Pennsylvania, 86 U.S. (19 Wall.) 125, to the effect that the burden rests upon the party guilty of a statutory fault to show, not only that *probably* his fault did not contribute to the disaster, *but that it could not have done so, The Pennsylvania* rule has been applied in instances of a vessel striking a bridge.[1] In *Dorrington v. City of Detroit*, 6 Cir., 223 Fed. 232, 245, the drawbridge operator failed to open the bridge in violation of the statute and the court, in reference to *The Pennsylvania* rule, said:

> "While it might probably be going too far to say that the failure to open the bridge caused the injury to the vessel, yet the city, having disobeyed the positive statutory mandate . . . should show that its failure could not have contributed to the injury."

We are not unmindful of the fact that *The Pennsylvania* rule has been the subject of varying discussions of different degrees of proof required to rebut the presumption that an infringing party is deemed to be at least contributorily negligent. Its application has yielded in many instances to what is commonly referred to as the major-minor fault rule. This latter theory is frequently invoked where there exists a statutory violation which is not deemed material or substantial—a problem which we are not required to meet in the instant case as it is abundantly clear that the statutory violations were material and contributed to the collision.

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[1]Other authorities applying the rule in *The Pennsylvania*, supra, to situations involving other than moving vessels are: *Richelieu and Ontario Nav. Co. v. Boston Marine Ins. Co.*, 136 U.S. 408 (applied to a stranding); *The Denali*, 9 Cir., 105 F. (2d) 413, on rehearing 112 F. (2d) 952, cert. den. *sub nom. Alaska S.S.Co. v. Pacific Coast Coal Co.*, 311 U.S. 687 (applied to a stranding); *United States v. Norfolk-Berkley Bridge Corp.*, 29 F. (2d) 115 (opinion by Judge Soper indicating rule applicable to collision between vessel and bridge); *Conners Marine Co. v. New York & Long Branch R. Co.*, D.C.N.J., 87 F. Supp. 132 (ship-bridge collision).

The lower court, in support of its conclusion, refers to *Savannah & N. Y. Transp. Co. v. Klaren Bridge Co.*, 4 Cir.,

252 Fed. 499. This was an action at law and not on the admiralty side of the court. The jury was left to determine whether minor deviations in the approved plans consituted a statutory fault which was tantamount to a proximate cause of the collision between the vessel and the bridge. We do not believe that our holding in the *Klaren Bridge* case is controlling in admiralty where the deviations in the plans are substantial.

The structure, of necessity, must be unlawful before *The Pennsylvania* rule becomes applicable. Authorities such as the *Pan Maryland*, 5 Cir., 199 (2d) 761, cert. den. 345 U.S. 909, and *Pacific Spruce Corporation v. City and County of San Francisco*, 9 Cir., 72 F. (2d) 712, are of little assistance because of the absence of such findings.

We are not unmindful of the fact that there may be proper limitations imposed upon *The Pennsylvania* rule as stated in *Webb v. Davis*, 4 Cir., 236 F. (2d) 90, 93:

> "The requirements of *The Pennsylvania* rule must be strictly enforced for the safety of navigation, but it should not be pressed to such an extreme as to justify a divfsion of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated."

To the same effect: *Compania de Maderas de Caibarien, S.A. v. The Queenston Heights*, 5 Cir., 220 F. (2d) 120, 122, cert. den. *sub nom. Esso Shipping Co. v. Compania de Maderas de Caibarien; S.A.*, 350 U. S. 824; *Seaboard Tug & Barge v. Rederi AB/Disa*, 1 Cir., 213 F. (2d) 772; *Koch-Ellis Marine Contractors v. Chemical Barge Lines*, 5 Cir., 224 F. (2d) 115; *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, 2 Cir., 173 F. (2d) 108, cert. den. 337 U. S. 919. Irrespective of these decisions, as well as conflicting views expressed by other courts, we believe that, at best, a critical analysis of the

opinions from the United States Supreme Court leads to the conclusion that the "reasonable possibility" test is appropriate. Indeed, in 1894 the Supreme Court expressly stated that *The Pennsylvania* rule refers to "possibility" rather than "probability". *The Martello*, 153 U.S. 64. In other cases the court has pointed out that *The Pennsylvania* rule is the settled rule and should be strictly applied. *Richelieu and Ontario Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408; *Belden v. Chase*, 150 U.S. 674; *Lie v. San Francisco & Portland S. S. Co.*, 243 U.S. 291.

The Pennsylvania rule, while not perhaps nullifying the doctrine of proximate cause in admiralty, undoubtedly creates a strong presumption that the material statutory fault is one of the contributing causes of the accident, and places upon the offender the burden of establishing that such violation could not, with "reasonable possibility", have contributed to the collision. Applying these principles to the facts at hand, we do not believe that the appellee has met the required burden. While appellee suggests that the protruding gear racks were not stressed by appellant at the time of trial in the lower court, the violation existed and was apparent from the drawings. Moreover, were we to disregard the protruding gear racks, we would arrive at a like conclusion because of the deviations from the approved plan. To hold otherwise would require us to conclude that a vessel, passing through the bridge opening at a place it admittedly had the right to be, would sustain only minor damage to its superstructure and, in turn, cause little or no damage to the bridge.

We agree with the district court in its finding that bridge fender systems should not be expected to withstand an impact from a 10,000-ton vessel making 5 knots or more under a "Full Speed Ahead" bell, but we do not feel that the resistance offered by the fendering system could not possibly have caused the ship to deviate to some extent, thus enabling it to

avoid striking the protruding gear rack. The force of this argument leads us to the inevitable conclusion that the appellee has not carried the admittedly heavy burden of establishing that its statutory fault could not have, under the "reasonable possibility" test, contributed to the accident and resulting damages. The fact that the approved plans and specifications made no provision for tolerance as to protruding gears; that the gears did protrude a matter of 18 inches from the outer face of the abutment; that the vessel's superstructure would have collided with the uppermost portion of the raised bascule span had the ship been navigated parallel with the fender system; and that the bridge opening was substantially reduced by reason of the unlawful structure; all point convincingly to appellee's difficult position in sustaining the burden imposed by reason of these statutory faults. From a review of the record we think it clear that appellee has not shown that the unlawful structure could not, under the "reasonable possibility" test, have contributed to the collision.

Proctors for the respective parties stated, at the time of argument in this court, that the extent of the damage to the bridge exceeded the damage to the vessel. We are not, therefore, called upon to determine the position of appellee with respect to its claim of sovereign immunity. Clearly, the appellee's claim is subject to setoff or recoupment.

Holding that the district court was in error in concluding, from the facts in this case that appellee had met the burden imposed by law, and being of the opinion that the situation herein presented calls for a division of damages, the decree of the district court is

Affirmed in part, Reversed in part, and Remanded.

DECREE

This cause came on again to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was re-argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by the Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of South Carolina, at Charleston, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be divided between the parties.

OPINION AND DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JUNE 8, 1959 (CASE NO. 7604 ON REHEARING)

OPINION

PER CURIAM:

Subsequent to our opinion in this case[1] we granted the appellee a reharing and, at the same time, denied a similar request as filed by appellant. We had previously concluded that, under the situation presented, the damages should be divided. On rehearing we adhere to our previously expressed view that the improper navigation of the appellant vessel contributed to the resulting damage, but we find it necessary to remand the case to the district court for further proceedings, without directions to divide the damages, to the end that specific findings may be made in light of the Pennsylvania rule. *The Pennsylvania*, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148.

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[1] *The Fort Fetterman v. South Carolina State Hwy. Dept.*, A Cir., 261 F. (2d) 563.

A portion of the prior opinion discusses at length the protruding gear rack, the authority for which is not disclosed on the face of the permit issued by the War Department. We agree with proctors for the parties that the plans and specifications must be considered as a part and parcel of the permit to determine whether the bridge was constructed in accordance with the provisions of 33 U. S. C. A., §491, 34 Stat. 84. An examination of these documents will not reveal to the untrained eye the status of the protruding gear racks when the bascule span is fully open. We are now told, however, that an experienced engineer[2] could detect from the plans the operation of the gear racks upon the opening of the bascule span, the result of which would constitute a protrusion beyond the face of the abutment. If such a protrusion was contemplated by the plans, it is not, of course, a deviation from the plans and specifications and there would be no statutory fault with respect to the gear racks, as the structure would be lawful to that extent. We therefore conclude, in order that this important issue be decided in the light of all the available testimony, that on the remand the parties should have an opportunity to present further evidence on the point and that the District Judge should make appropriate findings based on the present record and such additional evidence as the parties may present as to whether the protrusion of the gear racks was in accordance with or in violation of the permit issued by the War Department.

We think it clear that the Pennsylvania rule must be applied with relation to the statutory fault existing as to the maximum elevation of the raised bascule spans.[2] While we accepted the lower court's finding that the initial impact between the

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[2]Not called to our attention at the prior argument is the testimony of appellant's expert, Grushy, who intimated that the extent of the protrusion could be determined from the "contract drawings". Appellant insists, however, that the contract drawings are not a part of the plans and specifications approved by the Secretary. We express no opinion as to this point.

vessel and the bridge was at the gear rack, we do not agree on the record before us that the damage to the bascule span would not necessarily have occurred under the "reasonable possibility" test as stated in our previous opinion. The trial court, having failed to apply the Pennsylvania rule, may now consider the existing record and will undoubtedly permit further evidence on this point, as well as upon any other contended statutory fault.

We have not heretofore discussed appellee's contention that the bridge alteration of 1928 constituted a ratification of the existing structure when the 1928 permit was issued. Manifestly, this subsequent permit was limited to the placement of two additional dolphins in front of the northeast fender system. It is not relevant to the issues here presented.

Appellee seeks to introduce after-discovered evidence in the form of a memorandum dated June 5, 1926, addressed to the Chief of Engineers from the District Engineer in which the bridge was reported as completed "in accordance with conditions and plans approved by the Chief of Engineers, May 21, 1923, and the Assistant Secretary of War, May 23, 1923". Undoubtedly, on rehearing before the trial court this matter will be explored, but we direct attention to the language of Judge Soper in *United States v. Norfolk-Berkley Bridge Corp.*, 29 F. (2d) 115. Cf. *Monroe v. United States*, 184 U. S. 524. Subsequent investigation may reveal that the Chief of Engineers and the Secretary have approved of the deviations in which event the evidence discovered subsequent to this court's prior opinion would be very material.

The decree of the District Court is

Affirmed in part, reversed in part, and remanded.

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[2]Our prior opinion states that the bascule spans, when fully open, were required to be raised to an angle of 82 degrees. The findings of the trial court refer to approximately 80 degrees and we are duty-bound to accept this statement as it is supported by credible evidence.

DECREE

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, on the rehearing heretofore granted, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of this Court, entered in this cause on November 13, 1958, be; and the same is hereby, set aside and annulled; and it is further ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part as set forth in the opinions of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of South Carolina, at Charleston, for further proceedings in accordance with the opinions of this Court; and that the costs on appeal be paid by the appellee.

OPINION AND DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED MAY 19, 1960 (CASE NO. 8023)

HOFFMAN, District Judge:

OPINION

We have considered the merits of this controversy on two prior occasions[1]. Upon rehearing following our first opinion, we adhered to the applicability of the Pennsylvania rule, but remanded the case to the District Court for specific findings.

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[1] *The Fort Fetterman v. South Carolina State Hwy. Dept.*, 4 Cir., 261 F. (2d) 563.

The Fort Fetterman v. South Carolina State Hwy. Dept., 4 Cir., 268 F. (2d) 27.

Essentially there are two questions for determination. One involves the alleged protrusion of the gear racks and whether this constituted a statutory fault; the other concerns the admitted violation of the permit issued by the War Department prior to the construction of the Ashley River bridge with regard to the maximum elevation of the raised bascule spans.

As to the gear racks, we have heretofore proceeded on the assumption, conceded in argument by proctors for both parties, that the plans and specifications must be considered as a part and parcel of the permit to determine whether the bridge was constructed in accordance with the requirements of 33 U.S.C.A. §401, §491. Upon remand this matter was examined at length and, from the testimony presented to the District Judge, it is apparent that when an application to construct a bridge across navigable waters wholly within the limits of a state is submitted to the Chief of Engineers for approval by him and the Secretary of the Army, the "location and plans" required by §401 do not contemplate complete plans, specifications and finished drawings as a condition precedent to the issuance of a permit authorizing construction of the bridge. By the terms of §491, acknowledged as a part of the Bridge Act of 1906, it is provided that, when authority is granted by *Congress* to construct and maintain a bridge across or over any navigable water of the United States, the "bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of the Army and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works." Section 491 further states that when the plans for any bridge

constructed under the Bridge Act of 1906 have been approved by the Chief of Engineers and Secretary of the Army, "it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." In 1946, the Bridge Act of 1906 was further implemented and modernized by 33 U. S. C. A. §525-533 but, of course, these latter statutes are not applicable to the Ashley River bridge constructed during the years 1923-25.

As the bridge in question was built under authority of the South Carolina Legislature (30 S. C. Stat. 1072) and the navigable portions are wholly within the State of South Carolina, it is clear that the applicable statute is 33 U. S. C. A. §401—a fact that was not mentioned until receipt of appellant's supplementary brief on rehearing. Both parties now concede that §401, formerly a part of the Rivers and Harbors Appropriation Act of 1899, is controlling. It is important to the extent that §401 requires the submission and approval of "the location and plans" of the bridge, whereas §491 calls for the submission of "the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject."

The application for a permit required that there be submitted, among other things, the following: "(b) Plan of the bridge showing the length and height of spans, width of draw openings, position of piers, abutments, fenders, etc., and those features which affect navigation, giving on both horizontal sections and elevations the outside structure lines separating the area left for navigation from the area occupied by the bridge, and, in figures, the least clear width of openings at right angles to the axis of the channel, and the least clear heights with reference to high water, ordinary boating water,

and low water. (c) The essential features of the draw in two positions, closed and fully open." These particulars were contained within the so-called "plans" accompanying the application of the Sanitary & Drainage Commission of Charleston County for a permit to construct the bridge in question. The "plans" approved consist of one ordinary letter-size sheet entitled "Plan and Profile for Proposed Reconstruction of Bridge." It reveals the 138 feet clear opening between the raised bascule spans, but demonstrates nothing with respect to the location of the gear racks. Appellant contends that as the gear racks constitute a "feature which affects navigation", a violation of the permit follows.

It now appears from the testimony following remand that neither the Secretary of War nor the Chief of Engineers had before them the detailed drawings and specifications at the time of the issuance of the permit. The District Court has found, upon credible evidence, that the protrusion of the gear racks was not a feature affecting navigation, and was not required to be shown on plans submitted for approval. Such a finding is amply supported in the procedures followed by the Army Engineers. While undoubtedly additional particulars could have been required as a prerequisite to the issuance of the permit under 33 U. S. C. A. §401, they were not demanded as to this application. Moreover, the interpretation placed on the permit and so-called "plans" by the Army Engineers is entitled to weight. *Baltimore & Ohio R. Co. v. Jackson*, 353 U. S. 325; *United States v. Zucca*, 351 U. S. 91. The interpretation of the requirements established by the Army Engineers furnishes a rational basis for its conclusions and may not be disturbed by judicial action in such instances. *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 146.

As so interpreted by the administrative agency, the word "plans" as denominated in 33 U. S. C. A. §401 does not contemplate the submission of detailed drawings and specifica-

tions, unless specifically demanded by the agency as a condition to the issuance of the permit. The burden rests upon the party asserting the statutory fault to establish same. As to the protruding gear racks this burden has not been met and, on this point, no fault exists which calls for the application of the Pennsylvania rule.

We turn to the overhanging bascule span which, as noted, is an admitted violation of the permit. The District Court, at the first trial, did not consider the Pennsylvania rule and predicated its finding on lack of proximate cause. On remand the trial court applied the Pennsylvania rule and concluded that there was no reasonable possibility that the destruction of the bascule span, which occurred at an angle of elevation of 71 degrees, would not have occurred had the bridge been elevated to an angle of 80 to 82 degrees. Thus, the District Court held, the appellee had met the harsh burden imposed by the Pennsylvania rule.

In our former opinion (261 F. (2d) 563, 567), we accepted as a fact the lower court's finding that the initial contact of the ship with the bridge was at the gear rack on the downstream girder of the western bascule, and that this impact with the gear rack caused the collapse of the bascule span. On remand, appellant sought to reopen this question. The District Court properly declined to reconsider this phase of the case. Faced with this finding of the trial court, approved upon appeal, we must now examine the findings and conclusions on remand in light of the decision in *McAllister v. United States*, 348 U. S. 19, modification denied, 348 U. S. 937. Unless the judgment below is clearly erroneous, we are bound by the findings of the District Court.

We do not suggest that, in applying the Pennsylvania rule, a court may not, to some extent, speculate as to what may have happened because of the existing statutory fault. In-

deed, the rule itself requires such an approach. However, this is likewise a factual matter to be determined from credible evidence, and we cannot say that the District Court was clearly in error in reaching the conclusion that no material damage would have resulted if the vessel had not struck the gear rack. We must consider the circumstances at the particular time and place, and under the conditions then prevailing, in ascertaining whether the overhang of the bascule span could have, with reasonable possibility, contributed to the disaster. The trial court concluded, after a full hearing, that the overhanging bascule span could not have contributed to the consequent damage under the peculiar circumstances of this case. Irrespective of our personal views, we cannot say that this finding is plainly erroneous, and this is so even though a portion of the vessel's superstructure would perhaps have come in contact with the overhanging bascule if the ship had proceeded through the opening without striking the gear rack. The District Judge more adequately explains his determination of this issue in the following words (177 F. Supp. 76, 84):

> "The gear rack moves in a constant arc and beyond a bridge elevation of about 50° would have presented the same amount of protrusion at any bascule elevation up to the limits of opening, had the bridge been elevated to 80° or 82° at the time of this accident, instead of 71° as it was, the amount of gear rack protruding would have been the same, but the impact of the vessel would have been against a different section of the gear rack, about a foot or so below the actual point of contact. Thus, at 80° or 82° elevation, the blow of the ship would have struck a portion of the gear rack further away from the cross-frame or stiffener which joins the downstream girder to the upstream girder at the point of the live-load shoe. The resistance of the girder and gear rack to torsion and horizontally-applied force pro-

gressively decreases as the distance from this cross-frame or stiffener increases, and, therefore, the likelihood of collapse of the bridge would be greater at the higher elevation. In any event, the fact that the bridge was elevated to 71 instead of 80 or 82 could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would have been sustained whether the bridge had been elevated 61, 71, 80 or 82."

Appellant's final contention is that the fender system on the west side of the ...ew was located about one foot further channelward than th... permit indicated. The District Court effectively disposed of this argument by stating that the force of the impact was such that the fender system, wherever placed, could not have prevented contact with the gear rack. We must assume that, on rehearing, the trial court concluded that the vessel would not have deviated and thus avoided striking the gear rack, irrespective of the condition of the fendering system on the western side.

If, in applying the Pennsylvania rule, we are bound by the principles in *McAllister v. United States*, supra—and we are unaware of any exception which places the Pennsylvania rule in any special category—we must accept the findings of the District Court. On the entire evidence we are not left with the definite and firm conviction that a mistake has been committed.

The decree appealed from is

Affirmed.

DECREE

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby affirmed with costs.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JULY 1, 1960.

ORDER

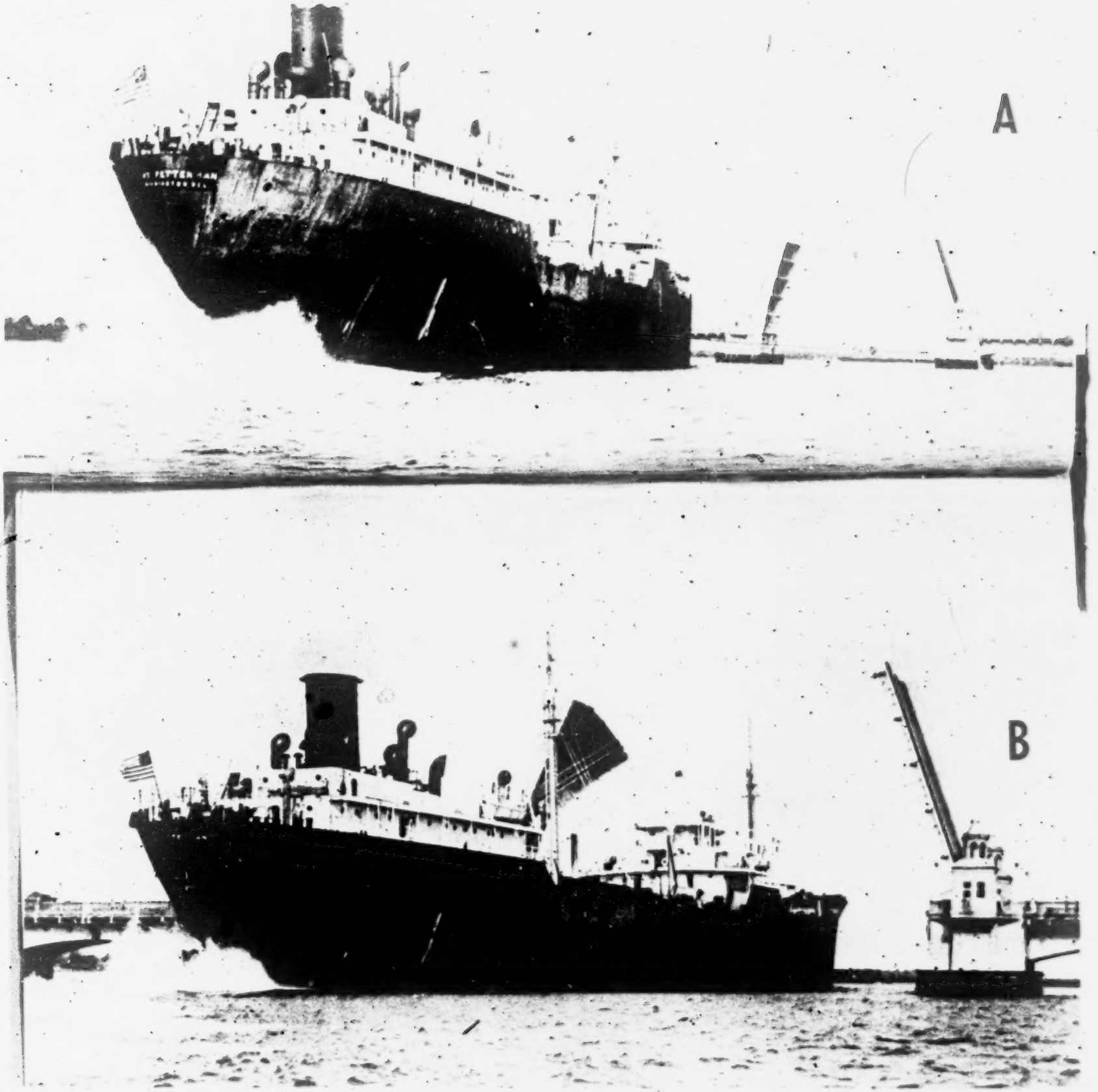
Upon consideration of the appellants' petition for rehearing, the same is hereby denied.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

MORRIS A. SOPER
United States Circuit Judge

WALTER E. HOFFMAN
United States District Judge

FILED—
July 1, 1960
R. M. F. WILLIAMS, JR., Clerk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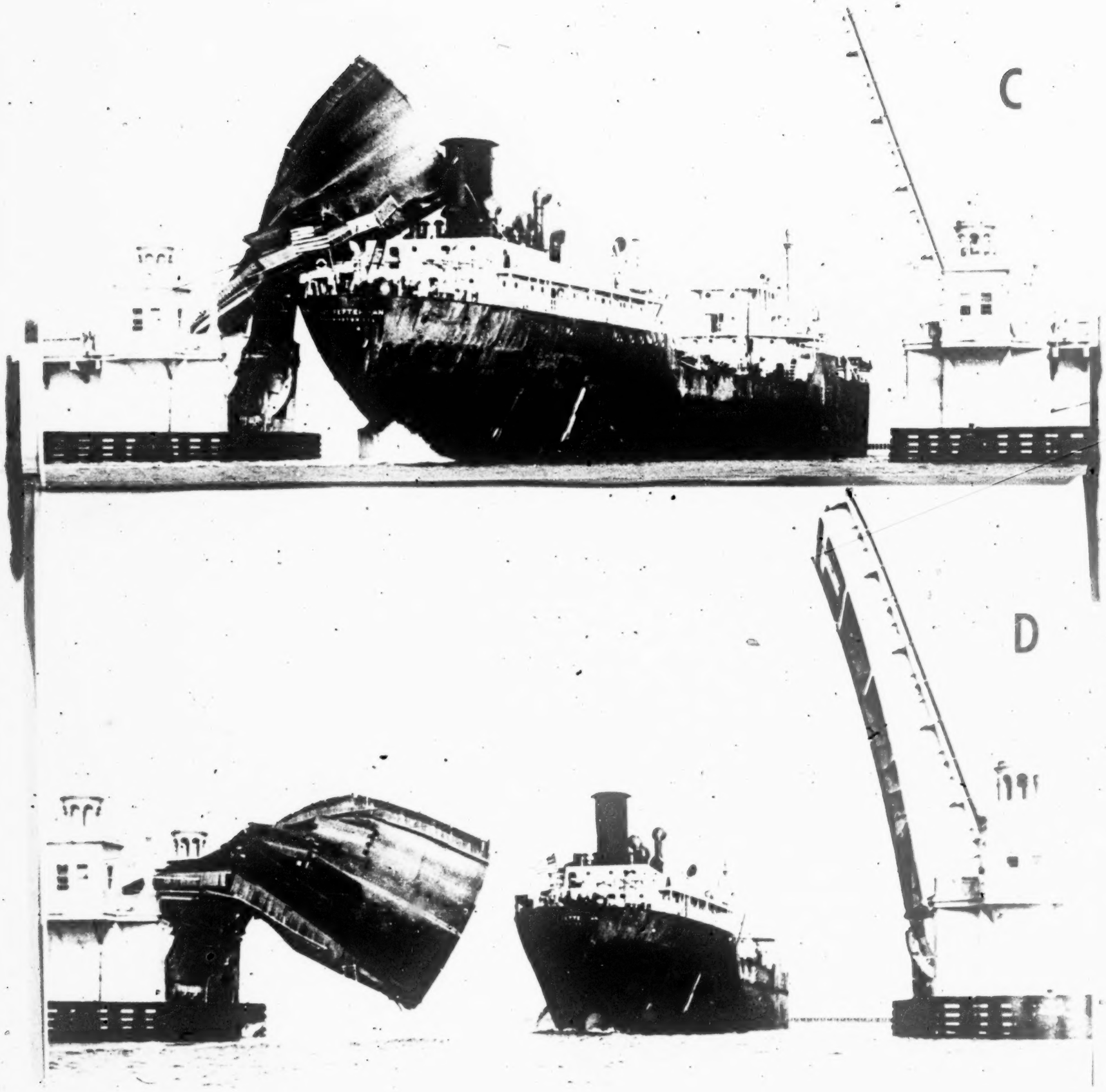
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(F)

APPLICATION FOR APPRO . OF PLANS OF A BRIDGE TO CRO NAVIGABLE WATERS OF THE UNITED STATES

5/16/23 Copy of instruments with plans attached, furnished applicant. Ltr

(See Instructions on the back of this sheet.)

Columbia, S. C.
(Place)

April 10, 1923
(Date)

THE SECRETARY OF WAR,
War Department, Washington, D. C.

SIR:

1. Application is hereby made by Sanitary & Drainage Commission of Charleston County. of S. C. State Highway Department, Columbia, S. C., for approval by the Chief (Give post office address)
of Engineers and the Secretary of War of plans of a bridge to be reconstructed
across Ashley River at Charleston, S. C. and 8 mi. from ocean
(Give name of waterway and distance of proposed location of bridge from some prominent city or town and from mouth of waterway)

2. The legal authority for the structure is found in

~~Act of Congress approved~~ ~~by Chief of Engineers~~
~~page~~ ~~Copy of act herewith~~

Act of State of South Carolina, approved February 14th, 1918
copy herewith, certified by the Secretary of State under seal.

~~General law of the~~ Act of State of South Carolina, approved March 25th, 1918
found in Vol. 29, page 249 of the statutes of that State.

~~Articles of incorporation, copy herewith, (See paragraph 4 below.)~~

3. Plans of the proposed structure are herewith, as follows, in quadruplicate

INSTRUCTIONS TO ACT ... IS—ADDITIONAL IS FOUND ON THE OPPOSITE SIDE OF THIS SHEET

I. Legislative Authority and Approval of Plans.

(*a*) Prior Authority Necessary.—A bridge can not lawfully be constructed across any navigable waterway of the United States until prior legislative authority has been obtained and the plans have been approved by the Chief of Engineers and the Secretary of War. (See section 9 of the river and harbor act approved March 3, 1899; and the general bridge law approved March 23, 1906.)

(*b*) Legislation Required.—The legislative authority must be obtained from Congress if the navigable portions of the waterway are not within the limits of a single State. If they are within the limits of a single State, the authority may be either Congressional or State.

II. Application for Approval of Plans.

(*a*) Form.—When the proper legislative authority has been obtained, the application for the approval of plans should be made in the form found on the opposite side of this sheet. The applicant will fill in the necessary data for the particular application and cancel statements which do not apply.

(*b*) Signature.—The application must be signed by the person or organization authorized to build the structure or by a properly authorized agent. In case of signature by an agent or by an official of a corporation, a duly authenticated copy of the authority for the action must accompany the application.

III. Identity of Applicant.

(*a*) Identification to the Department.—In all cases applicants must be satisfactorily identified to the District Engineer. If the applicant is a corporation, it must also furnish for the information of the Department copies of the following papers, all properly authenticated:

The charter or articles of incorporation.

The minutes of organization.

Extract from minutes showing the names of existing officers of the corporation.

(*b*) Identification in Cases of Applications by State or County Officers.—Where State laws vest in State or county officers, such as boards of supervisors and county courts, the power to authorize the construction of bridges, they must furnish with their application certified extracts from their proceedings showing their action authorizing the proposed structure.

IV. Drawings.

(*a*) General Description.—See paragraph 3, on opposite side of sheet.

(*b*) Character of Sheets.—As a general rule, one set of the plans furnished should be on tracing linen. An exception will be made in cases such as the representation of the data on excerpts from printed charts or plans, provided the work is sufficiently clear and distinct to permit the making of reproductions by photographic process. In such cases a different color should be used to give prominence to the location of the work and to the essential features covered by the application.

(*c*) Size of Sheets.—The size of the maps and plans should be limited to the dimensions of an ordinary letter-size sheet. If larger dimensions are found necessary, the plans should fold to letter size and should not exceed 27 inches by 10 inches in any case.

(*d*) Structural Details.—Only those should be shown which are needed to illustrate the effect of the proposed structure on navigation. The omission of all other details is generally preferable.

(*e*) Special Information Required.—The points of compass and graphic scales must be shown and also the relative strength of currents, both ebb and flood, or low water and high water, close to the proposed location of the structure, and at both ends of the extent of waterway shown on the map of location.

V. To Whom Application Should Be Presented.

(*a*) The application and the papers and plans accompanying it should be mailed or delivered to the Engineer Officer of the United States Army in charge of the locality at which the bridge is to be constructed, as his report thereon will be required for the information of the department. If that officer is not known to the applicant, the application, papers, and plans may be sent direct to the Secretary of War, and it will then be referred to the proper officer for report.

FILE COPY

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OCT 24 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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Seaboard Tug & Barge, Inc. v. Rereri AB/DISA, (The Lia), 213 F. 2d 772, 1954 A.M.C. 1498, 1 C.A. 1954 39

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Star of Honduras, The, 220 F. 2d 120, 1955 A.M.C. 797, 5 C.A. 1955 44

Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65 37

Tidewater Pipe Co. v. Dredge Crest, 278 F. 2d 489, 1960 A.M.C. 1419, 2 C.A. 1960 47

2. The legal authority for the structure is found in

Act of State of South Carolina, approved February 14th, 1913

Act of

copy herewith, certified by the Secretary of State under seal

State of South Carolina, approved March 25th, 1915

found in Vol. 29, page 249, of the statutes of that State.

3. Plans of the proposed structure are herewith, as follows, in quadruplicate:

(a) A map showing the proposed location, and the waterway for the distance of 1 mile above and below, with the data in regard to low and high water, direction and strength of currents, soundings, existing bridges in the vicinity, etc., necessary to enable the Chief of Engineers and the Secretary of War to determine whether the location is a proper one.

(b) Plan of the bridge showing the length and height of spans, width of draw openings, position of piers, abutments, fenders, etc., and those features which affect navigation, giving on both horizontal sections and elevations the outside structure lines separating the area left for navigation from the area occupied by the bridge, and, in figures, the least clear width of openings at right angles to the axes of the channel, and the least clear heights with reference to high water, ordinary boating water, and low water.

*(c) The essential features of the draw in two positions, closed and fully open.

4. The identity of the applicant is established by the following papers herewith:

A certified extract from the proceeding of Sanitary & Drainage Commission of Charleston County and copies of acts of Legislature referred to above with reference to the construction of the bridge.

5. Remarks: The Ashley River lies wholly within the State of South Carolina

Chairman, Sanitary & Drainage Commission of Charleston County

* Note: The applicant [illegible]

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U. S. v. United States Lines Co., (The William J. Riddle) 200 F. 2d 608, 1953 A.M.C. 132, 2 C.A. 1952 41

Webb v. Davis, (The Dixie B), 236 F. 2d 90, 1956 A.M.C. 1789, 4 C.A. 1956 43

White Oak Transp. Co. v. Cape Cod & N. Y. Canal Co., 258 U.S. 341, 42 S. Ct. 338, 66 L. Ed. 649 (1922) 37, 39, 53

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IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE CASE AND THE QUESTIONS INVOLVED.

A. THE CASE

This suit in admiralty arose out of a collision which occurred in perfect visibility at about 9:30 on the morning of October 5th, 1955, when the negligently operated T-2 Tanker FORT FETTERMAN ran into and destroyed the raised western bascule arm of the drawbridge spanning the Ashley River in Charleston Harbor. More than usual interest attached to the collision by reason of the on-the-scene action photographs of the collision, which were taken by a news cameraman sent out to witness the passage of this large tank steamer through the open drawbridge. The four pictures,

which were snapped from an open small boat following the vessel, appear as exhibits in the Petition for Certiorari.

The litigation on the merits has been long protracted,[1] since the Respondent's right to recover was challenged on the ground that it was guilty of one or more statutory faults in the operation of the drawbridge. Efforts to delay the trial were also made by the Petitioner.[2]

Twice has an experienced trial judge, sitting by designation in the District Court for the Eastern District of South Carolina, resolved the merits of the controversy against the moving vessel.

These findings have now been affirmed in toto by the Court of Appeals for the Fourth Circuit in its unanimous opinion rendered May 19, 1960 (278 F. 2d 921, 1960 A.M.C. 1325).

The purpose of certiorari is not to provide for review of facts, but the questions which the Petitioner seeks to have the Supreme Court review are questions of fact, pure and simple, and the case does not now and never has involved any special or important reasons for review by this Court.

In the case of *McAllister v. United States*[3] the Supreme Court decided that:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not

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[1] 155 F. Supp. 339, 1958 A.M.C. 1735; 261 F. 2d 563, 1959 A.M.C. 1; 268 F. 2d 27, 1959 A.M.C. 1342 (Remand following rehearing); 177 F. Supp. 177 F. Supp. 76, 1959 A.M.C. 2403; 278 F. 2d 921, 1960 A.M.C. 1325.

[2] Petitioner's efforts to stay the trial were unsuccessful throughout: 148 F. Supp. 620, 1958 A.M.C. 1729; aff'd, 242 F. 2d 799, 1957 A.M.C. 1001; cert. den. 355 U.S. 826, 2 L. Ed. 2d 40, 78 S. Ct. 35.

[3] 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20; modification denied, 348 U. S. 957, 75 S. Ct. 447, 99 L. Ed. 748 (1954).

set aside the judgment below unless it is clearly erroneous."

This ruling has met with universal and perhaps grateful acceptance by the Courts of Appeal.[4] Therefore, had the District Court decided in favor of the Petitioner, and had the Court of Appeals reversed, some reason for the filing of this application for certiorari might exist. But in this case, the findings of fact by the District Court against the Petitioner have been affirmed by the Court of Appeals in all instances. Therefore, what the Petitioner really seeks, is to impose upon this Court the extraordinary burden of again reviewing a complicated set of facts which have been the subject of oral argument before the Court of Appeals on no less than four occasions.

To disguise this transparent attempt to persuade this Court to review and decide questions of fact, the Petitioner pretends that the harsh rule of the *Pennsylvania*[5] has been misapplied. This anachronistic rule, prevailing only in admiralty, which requires one guilty of a statutory fault to prove not only that the fault did not participate in the proximate cause of the collision, but that the fault could not, with *reasonable*

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[4]Lyon v. U.S.A., 265 F. 2d 219, 2 C.A. 1959; Armour & Co. v. Compania Argentina, 263 F. 2d 323, 2 C.A. 1959; Gorska v. Penna. R.R. Co., 262 F. 2d 198, 2 C.A. 1959; Nonsuco v. Gulfport, 262 F. 2d 349, 2 C.A. 1958; Raybourne v. Gulf Atlantic, 276 F. 2d 90, 92, 4 C.A. 1960; Gosnell v. U.S.A., 262 F. 2d 559, 4 C.A. 1959; Spanos v. The Lily, 261 F. 2d 214, 4 C.A. 1958; National Airlines v. Stiles, 268 F. 2d 400, 406, 5 C.A. 1959; O/Y Finlayson-Forssa A/B v. Pan Atlantic SS Corp., 269 F. 2d 11, 13, 5 C.A. 1958; Bloomquist v. McCarthy SS Co., 263 F. 2d. 590, 7 C.A. 1959; Clinton v. Joshua Hendy Corp., 264, F. 2d 329, 9 C.A. 1959; Albania Engine & Machine Works, Inc. v. American Mail Line, 263 F. 2d 311, 314, C.A. 1949; Marshall v. Westfal-Larsen, 259 F. 2d 575, 9 C.A. 1958.

[5]The Pennsylvania v. Troop, 19 Wall. 125, 86 U.S. 125, 22 L. Ed. 148 (1874).

possibility, have been a factor in the collision, was not applied by the Trial Court in the thirteen day original trial. It was partially because of the failure of the Trial Court to apply the rule specifically and in haec verba that the case was sent back for a second trial.[6]

Not satisfied with its success in imposing this harsh burden upon the Respondent, in the second trial the Petitioner went further, and unsuccessfully sought to convert the Pennsylvania Rule from a rule of evidentiary presumption, to a rule of absolute liability, an attempt which the Petitioner repeats in its Petition for Certiorari.

Petitioner's querulous claim of "injustice" in the conclusion of its Petition for Certiorari reminds Respondent of an example of despotic Turkish "justice" mentioned in one of the early South Carolina Reports. In the 1817 Preface to the first volume of the South Carolina Equity Reports (20 S. C. Reports, DeSauss. Eq.) Chancellor Henry W. DeSaussure told of the consequences of the accidental wrecking of a Turkish frigate on the island of Samos: The Turkish Pasha insisted that the people of Samos should pay for the frigate and the loss of her crew, "because the accident would not have happened unless their island had been in the way."

B. QUESTIONS INVOLVED: STATUTORY FAULTS CLAIMED BY PETITIONER.

In the final analysis there remained for consideration by the Court of Appeals the effect of but one statutory fault on the part of the Respondent. The Respondent conceded from the beginning and throughout all trials that the War Department Permit required the bascule arms to be raised to an angle of opening of approximately 80°. Hower, in spite of

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[6] 268 F. 2d 27, 1959 A.M.C. 1342.

that requirement, and almost since its completion nearly thirty-years earlier, the bridge did not customarily open to the 90° angle, but opened to an angle between 71° and 74°. On the occasion of the collision, it had been opened to a 71° angle. On the first trial the Respondent successfully established that its failure to open the bascule beyond the 71° *did not* contribute to the collision and the resulting damages.

It has always been agreed that if the FORT FETTERMAN had not been negligently rammed into the bridge, as it was in this case, but had been properly controlled so as to pass straight through the draw opening, exactly parallel to and a hair's breadth away from the western fender system, the uppermost tip of her superstructure would have contacted the bascule at 71° elevation, but the Petitioner's own expert witness, Grushsky, conceded that in this hypothetical situation the damages resulting "would be relatively light" to both ship and bascule (Appellee's Appendix No. 7604, pages 402-403). However, as will be hereinafter pointed out (See II, H(2), the Pennsylvania Rule of statutory fault is not applied to such an imaginary and nonnegligent approach of the vessel: it should be and is applied to the actual proven negligent and unseamanlike approach which the vessel did in fact make. It was under such an application of the Pennsylvania Rule that the two Courts below found Respondent had met and overcome the burden thereof.

In the first trial, the Petitioner advanced the contention that there had been a second statutory fault in the form of a delay in opening the bridge. The conflict in evidence on this point was resolved against the Petitioner by the Trial Judge and affirmed on the first appeal on the merits. Yet this delay in opening finds itself again presented as Point Number 4 on page 56 of the Petition for Certiorari!

An alleged third statutory fault—the position of the gear

rack used to lift and lower the bascule—made its appearance in the litigation after the first trial and in the first appeal on the merits to the Court of Appeals under the circumstances now related.

The factual theory of the Respondent as to the immediate cause of the destruction of the bascule, which was proven and accepted by the Trial and Appellate Court, is as follows:

The FORT FETTERMAN was making an improper crab-like approach at full speed ahead from leeward, and despite a hard right rudder, was kept on the leeward shore by adverse conditions of wind and tide. As observed by the District Judge, "it was to all intents and purposes out of control" when it smashed into the bridge[7]. The many million foot-pounds of force exerted by the FORT FETTERMAN, then moving rapidly under a full speed ahead bell, jammed the fender piling back against the concrete abutment, and permitted the hull of the vessel to destroy the gear rack.

The District Court agreed with this theory, describing the effect of the blow as follows:[8]

> "The blow of the hull of the ship against the gear rack on the downstream girder twisted that girder and its lower flange out of the plane in which they were designed to bear weight and stress so that the compression on the flange was lost and the natural force of gravity caused the downstream side of the bascule immediately to droop, sag and fall from its 71° elevation, before the vessel's fashion plate and forward superstructure had entered the draw opening. During that time the vessel, still under forward momentum, rebounded, glanced off or sprung away to her right from the abutment and

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[7] 177 F. Supp. 76, at 82.

[8] 155 F. Supp. 359, at 366.

fenders so that in the few seconds that it took for her fashion plate and superstructure to progress forward to a point opposite the downstream girder; she was no longer in contact with the fender system and was back in the clear opening between fenders. During these same few seconds, the downstream girder fell several degrees, so that it dropped on or directly in the path of the vessel's fashion plate and superstructure."

The gear rack was some *42 inches behind the fender system*, and thus *42 inches outside of and shoreward of the navigational fairway* set apart for water borne traffic.

In its first decree, the Trial Court assumed that the so-called protrusion of the gear racks from the face of the concrete abutment was not a violation of the permit, since it was located outside of the navigational fairway.

Nowhere in the record of the first trial does there appear any challenge on the part of the Petitioner to this assumption. Its contention was that no substantial contact had occurred between the vessel and the gear rack; that a satisfactory approach had been made, but that the collision resulted from an unexplained "sudden sheer."

In its appeal from the District Court's decree, the Petitioner advanced the theory that the gear rack was improperly located. The Petitioner was first successful in persuading the Court of Appeals that since the existence of the gear rack did not appear on the miniature sketch plan of the proposed bridge, accompanying the permit application, it was a violation of the permit.[9] On rehearing, the Court of Appeals modified its finding that the gear rack violated the permit, but sent the case back for re-trial to determine the legality of the position of the gear rack as a question of fact.

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[9]261 F. 2d 563, at 567.

On remand, the District Court found, on the basis of substantial testimony, that the location of the gear rack in relation to the concrete pier supporting the bascule was not violative of the permit. This finding was affirmed on appeal, which thus left for consideration at the Trial and Appellate level, as the sole statutory fault of which the Petitioner was guilty, the effect of the Respondent's failure to raise the bascule to the angle of approximately 80° as required by the permit.

At the remanded trial, the District Court found, on the basis of the reasoning set forth in its opinion, that:

> "The fact that the bridge was elevated to 71° instead of 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would have been sustained whether the bridge had been elevated 61°, 71°, 80°, or 82°."

Thus, did the District Court apply the Pennsylvania Rule in the manner directed by the Court of Appeals.

This finding was affirmed upon appeal in the opinion rendered on May 19, 1960.

While the Petitioner has repeatedly contended that the Respondent had failed to provide adequate fenders, this contention was never sustained at any level, Trial or Appellate; nothing on the War Department permit prescribes the quality or quantity of the bridge fender system.

II. ARGUMENT

The Petition before this Court is replete with inaccurate statements of the facts. Unproven factual theories, rejected at both the Trial and Appellate level, are set forth in the Petition in such a manner that a casual reader would assume

they were admitted facts in the case. For this reason, it is necessary to review the facts in order that no misunderstanding can exist. In doing so, we will pinpoint the substantial and credible evidence upon which the findings of both the District Court and the Court of Appeals are based, much of which is ignored by the Petitioner in the Petition presented to this Court. This review necessitates (A) a factual presentation as to the physical layout of the Ashley River Bridge and (B) a summary of relevant events leading up to the collision, and will include argument designed to demonstrate that substantial and credible facts support the findings and affirmances by the Trial and Appellate Courts. respectively, and that the existence of such evidence in the record cannot leave this Court in review with the definite and firm conviction that any mistakes have been committed below:

(C) Eye witnesses and expert testimony from qualified and competent persons establish that the FORT FETTERMAN was managed in a negligent and unseamanlike manner on her approach to and passage through the drawbridge.

(D) Voluminous testimony of numerous eye witnesses—many of them trained naval personnel familiar with the area in question—establishes that there was no delay in opening the drawbridge for the passage of the FORT FETTERMAN.

(E) Competent engineers, familiar with bridge and marine construction, established that the fender system provided at the Ashley River Bridge was adequate for its intended purposes.

(F) Because of the negligent and unseamanlike handling of the vessel, the forward part of her hull on the port side first struck the gear rack used to operate the western bascule, before any of the vessel's superstruc-

ture had entered into the draw opening, and this blow on the gear rack caused loss of compression support to the bascule, which sagged or fell immediately, and was thereafter in collision with the vessel's superstructure.

(G) The position of the gear rack, according to qualified Army Engineer personnel, and other engineers familiar with erecting structures constituting obstruction in navigable waters, was not violative of the War Department Permit for the bridge.

(H) The Pennsylvania Rule is a rule of evidentiary presumption, and does not take the place of facts; established facts in this case prevent the imposition of its sanction against the stationary bridge because under the facts of this particular collision, and the manner in which it occurred, the statutory violation by the bridge could not, with reasonable possibility, have contributed to the accident and damage.

A. THE BRIDGE

The Ashley River Bridge was built between 1923 and 1925, pursuant to authorization of the South Carolina Legislature (30 S. C. Stat. 1072) after plans for the construction and location of the same had been submitted to War Department officials and an approval permit issued May 23, 1923 (33 U. S. C. A. Sec. 401). Shortly after its completion, the bridge was taken over by the South Carolina State Highway Department, and has since been operated and maintained by that Department. The bridge spans the Ashley River and provides a double leaf or bascule type of draw opening at channel. The direction of the 110 foot channel is approximately southeast to northwest, and it is on a 20° skew or angle measured counter clockwise from a perpendicular to the center line of the roadway on the bridge.

The bridge provides four lanes for vehicular traffic, the flow of which at the time of the collision five years ago comprised some 30,000 motor vehicles daily. Water traffic through the draw is relatively light, averaging about 300 passages per year, of which only very few were made by large vessels. Only 4 or 5 Tankers had been sent through this draw in the seven years preceding this collision (Appellee's Appendix No. 7604, p. 386-387).

The bridge permit granted by the Army Engineers in 1923 shows for this draw opening a "110' 0" clear channel," and this 110 foot dimension is also given on the applicable Coast and Geodetic Chart. The permit shows further "138' 0" clear" between the fenders which are located inside the draw opening close to the concrete side abutments. Lastly, the permit shows "146' 0" face to face" between concrete abutments, thereby leaving 4 feet on each side for a protective fender system. The simple sketch plan made a part of the permit is attached hereto as *Annex A*, with the red lines shown thereon as they appeared on the original permit. These red lines have great significance inasmuch as the Army Engineers' regulations require that the clearance of the navigation opening of a bridge of this type be outlined in red, and the clearance here outlined in red is that between fenders only, and not between the concrete abutments. The fender system on each side consisted of a line of piles driven far into the mud and joined together with horizontal strake boards on the channel side, with heavy timbers on the top providing a walkway. The piles along the face of the concrete abutment were not braced or battered against a blow from the channel, and in fact could not be so braced or battered because of a protruding concrete ledge far under the mud out towards the piles (Appellant's Appendix in No. 7604, p. 89-90). When new piles were added, from time to time, no effort was made to remove piles for whose replace-

ment the new piles were intended (Appellant's Appendix in No. 7604, p. 27, 218, 243).

Each bascule consists of two long steel girders supporting the roadway in between. These girders were widest in the vertical plane at the point near the trunnion or axle about which the bascule rotates. The two girders on each leaf were connected and held in place in their vertical plane by trussed cross frames and stiffeners under the roadway. Heavy steel flanges in the horizontal plane furnished bearing and weight-supporting strength to the upper and lower side of each girder. In any position of the bascule, the top flange is subject to tension and the bottom flange to compression. The maximum compression area of the lower flange is at the trunnion or axle end where the gear rack is attached to it.

Electric motors assisted by counter weights raise and lower the bascule arms by operating a system of gears near the foot of each girder. A gear-wheel pinion engages a quadrant gear rack attached to the bottom flange of each girder, and the movement of these pinions forces the gear rack and the bascule up or down. This gear rack can be plainly seen in *Annex B*. The pinion which moves the gear rack is out of sight inside the concrete abutment. When the bridge is closed, the two bascule tips are connected and held together by a mechanical center lock which makes the roadway level. In the closed position, the trunnion ends of the girders of each bascule rests on heavy cast steel blocks attached to the bottom flange of each girder. These blocks are known as live-load blocks or shoes, and in closed position they rest on similar but immovable blocks secured to the concrete abutment. In the raised position, this live-load block is about 2½ feet above the upper end of the gear rack on the lower flange of each girder.

In the process of raising or lowering the bascule, the gear

racks move in a constant arc, and the outermost point of protrusion of the teeth of the gear rack extends about 18 inches beyond the face of the concrete pier, but, at the corner where this collision occurred, 3½ feet within or shoreward of the fender piling along the face of the concrete pier. No portion of the gear rack in question at the time of this accident extended channelward of the fenders; the gear rack which was struck by the FORT FETTERMAN was 3½ feet back of or shoreward of the fenders. By the same token, the gear rack was 3½ feet shoreward of the line on the permit representing the limits of the 138 foot clearance required thereby, and did not in any way reduce or interfere with this clearance. Similarly, the gear rack in question was 3½ feet shoreward of the red line drawn on the permit sketch to mark the navigational clearance of the draw opening, and did not encroach or protrude into that clearance. The Respondents are most anxious that this feature of the bridge construction and operation be made clear because they fear that their failure to make the same clear and understandable in the first appeal in this litigation resulted in an inadvertent misunderstanding by the Court of Appeals. Fortunately, Respondents' failure in this respect was remedied on rehearing and at the remanded trial.

B. THE COLLISION AND EVENTS LEADING TO THE COLLISION.

The FORT FETTERMAN arrived in Charleston Harbor on the afternoon of October 4, 1955, with a cargo of creosote consigned to the Koppers Company, which is located several miles up the Ashley River. Due to silting in the Ashley River (upstream from the bridge), it was necessary that the FORT FETTERMAN be lightened. As a consequence, a portion of her cargo was transferred to barges until she was lightened to a desired draft of 15 feet fore and aft. She got under way

on her voyage to Koppers at about 9:00 A.M. on the morning of October 5, 1955, proceeding south in the Cooper River of Charleston Harbor for about a mile, and then making a right hand turn at White Point Buoy to set a generally northwest course up the Ashley River towards the Ashley River Bridge. The distance from White Point Buoy to the Bridge is about 5,000 yards, and there are no bends or turns in the River between the two points. A partial drawing, traced from the Coast and Geodetic Survey Chart of Charleston Harbor is attached hereto as *Annex C*; various land marks referred to in the testimony and in the opinions below have been identified on this tracing. The chart was an exhibit at the trial.

On the day in question the weather was clear and visibility was good; there were no mechanical breakdowns on the ship at any time, and all orders from those in charge of her management were promptly carried out during the entire period involved in the collision. The wind was blowing from the east at a speed of about sixteen miles per hour; tide was flooding at not less than two or three knots in the same direction as the vessel was moving, and reached an unusual high of 7.2 feet above mean low water at the bridge one hour after the accident. At a 15 foot draft the FORT FETTERMAN showed more than 24 feet of hull exposed above the water line; at this draft, 7 feet of her rudder extended out of the water, as did 6 feet of each propeller blade on every revolution, as can be seen from Exhibits A, B, C and D to the Petition for Certiorari. A tug was employed to accompany the vessel up the river, but at no time assisted her nor communicated with her. The Trial Court found that the bascule spans of the bridge were opened in ample time for the transit of the vessel. At the Black Can Buoy, about 900 yards below the bridge, the FORT FETTERMAN moved to her left or to the leeward side of the river in order to reach a position from which she might again come to the right and proceed upstream in

direct line with the skewed draw opening. A two to four knot current in the river was on her starboard quarter, and the sixteen knot wind was just about directly on her exposed beam. After she was put down to leeward, the Pilot put on a hard right rudder and crowded on speed in an effort to bring her back up against the wind and current so as to enter the draw in proper fashion. The full speed and right rudder put her bow to the right and her stern to the left, but she never recovered sufficiently from her downwind maneuver to be straightened out for her passage through the draw opening; crabbing sidewise under a full speed ahead bell, she crashed into the protective fender piling on the downstream corner of the west concrete abutment. The force of this blow crushed the fender piling back several feet and up against the concrete abutment permitting the hull of the vessel, at a point on the port side 135 feet aft from the stem about 2 feet below her flush main deck, to hit the quadrant gear rack which supported the downstream girder of the upraised western bascule. Following this contact, the ship rebounded or moved away from the western abutment and proceeded through the draw. Her speed was not reduced until after contact with the bridge structure. Photograph No. 18 of Respondent's Exhibit P-1 is attached hereto as *Annex B* in order to familiarize the Court with the nomenclature of the bridge structure and to show the appearance of the bascule without damage. In this photograph, passage of the vessel should be visualized as angled from the right background to the left foreground, and crashing into the corner of the fender system below the gear rack.

The blow of the ship's hull on the gear rack broke and bent the same and thereby caused a twisting or distortion of the bascule's lower flange and girder. As soon as this flange and girder were distorted and twisted out of the plane in which they were designed to bear a load, the girder failed and crumpled at the point of the blow to the gear rack, and the

downstream side of the western bascule sagged or drooped downward on or into the path of the ship's superstructure, which is some 40 feet aft of the point where the hull initially struck the gear. Photograph No. 13 of Respondent's P-1 is attached hereto as *Annex D* to show the point on the vessel's hull where initial contact was made with the gear rack and the point some 40 feet aft where her superstructure begins at the rising curve of her fashion plate. The superstructure of the vessel did not collide with the erect bascule at its original elevation ;the failure of the girder resulting from the blow of the ship's hull on the gear rack and the consequent distortion of the flange caused the bascule or its downstream girder to drop several degrees from its original elevation before the superstructure of the vessel ever entered into the immediate draw opening. The collision of the vessel's fashion plate and superstructure with the already falling bascule caused further damage to the bridge and the vessel, and the bascule slowly collapsed along the vessel as she went through and finally fell into the water. Photograph No. 20 of Respondent's Exhibit P-1 is attached as *Annex E* to show the damaged mechanism after the accident. The camera here is facing the direction from which the vessel came, and the broken and bent gear rack, as well as the crumpled and displaced lower flange are plainly visible in this photograph.

C. THE FORT FETTERMAN WAS NEGLIGENTLY HANDLED.

Despite trial findings and appellate affirmances against the vessel on the propriety of her navigation at and prior to the collision, Petitioner, on pages 16 and 17, and pages 57, 58 and 59, and page 61 of its Petition, once more belabors the point in an effort to obtain factual review by this Court. Again the Petitioner claims that the collision resulted from a "sudden sheer." The record does not sub-

stantiate this assertion. The Trial Judge initially found, among other things, that the vessel was in good position for her approach to the draw opening at the time the bridge had completed opening, that she had steerageway, was not yawing to one side or the other, and that everything was proper to go through the bridge. He further found that the bridge had completed opening "anywhere from four to ten minutes prior to the entrance of the bow of the ship into the draw opening." He further found that the vessel's last movement to the right greatly accentuated the adverse effect of both wind and tide in the handling of the vessel, and it was the failure to anticipate and make allowances for the same that caused the vessel's faulty approach. In addition, his findings included one to the effect that the force of the wind on the extraordinarily large sail area of the vessel, together with the current setting her to leeward, were not sufficiently provided against by the Pilot and the ship's officers, and that her approach to the draw opening from the leeward side was in violation of the time honored rule requiring mariners to "keep off the lee shore." He specifically found that the accident could have been avoided if those in charge of the vessel had waited for slack high water, had they allowed for wind and tide effect, or had they used the available tug to assist them in making the proper entrance into the draw opening. (155 F. Supp. 359, 1958 A.M.C. 1735). The Court of Appeals for the Fourth Circuit heard oral argument in March of 1958 and again on April 21, 1958, pursuant to an Order for Re-argument after the death of Judge John J. Parker, who had participated in the first hearing. With respect to the navigational skill of those in charge of the vessel, that Court said: "We have no difficulty in agreeing with the District Court as to its conclusions of improper navigation on the part of the Pilot and the ship's officers of the appellant vessel." The author of the opinion enlarged on this statement by pointing out that slack water tide would

have been preferable to a flood tide in negotiating passage of the vessel through the draw. Comment was also made with respect to the failure of those in charge of the vessel to exert any effort to determine or allow for the effect of the wind and tide on the vessel's maneuvering, although they were cognizant that the wind and tide were having an adverse effect on the vessel whose 68 foot beam had to be put through a charted bridge opening of 110 feet. The Court of Appeals summed up on this point as follows: "Success in the execution of this passage required care which was obviously absent in this case." Petitioner's insistence after two trials and two appellate reviews that the facts are otherwise requires Respondent to point to some of the evidence in the record supporting the conclusion of two Courts that the vessel was negligently managed.

The ship's agent was told by the Charleston Pilots office that the safe time for beginning the trip up the Ashley River was 9:30 in the morning (Appellee's Appendix in No. 7604, p. 67, 68, 385), but the Pilot, having been ordered aboard at 8:30, got her underway at 8:58, fifty-two minutes before the time recommended by the Pilot's Office (Appellee's Appendix in No. 7604, p. 87, 292, 293). It was nowhere questioned that the ship, having been lightened to a draft of about 15 feet, was showing a freeboard of about 24 feet; further, the testimony indicated that the vessel had with her a fair tide of 3 or 4 knots, according to experienced marine or naval witnesses (Appellee's Appendix in No. 7604, p. 131, 146, 163, 170). In the face of this, the Captain of the vessel, at the Coast Guard Hearing on the day immediately after the accident, testified that it was unusual to take a light vessel through such a bridge with a fair tide and that he did not like to do it if he could help it ((Appellee's Appendix in No. 7604, p. 13). The more than 12,000 square foot sail area of the lightened vessel and the effect of a 16 or 17 knot beam

wind thereon was recognized by the Captain, as was the fact that at a 15 foot draft the FORT FETTERMAN exposed 7 feet of her rudder and 6 feet of each propeller blade out of the water (Appellee's Appendix in No. 7604, p. 35, 290). The Pilot in charge of the FORT FETTERMAN had only taken one vessel through this bridge in the preceeding five years (Appellee's Appendix in No. 7604, p. 86).

The vessel's Captain knew that the wind was setting his vessel to leeward (Appellee's Appendix in No. 7604, p. 38); he also testified that the ideal position for his ship was on the right hand or windward side of the river (Appellee's Appendix in No. 7604, p. 50). Notwithstanding their alleged experience and knowledge, those in charge of the vessel took her down to leeward some 900 yards below the bridge (Appellee's Appendix in No. 7604, p. 2-3, 92, 247, 332, 133, 145, 199). The FORT FETTERMAN was never able to recover from this downwind movement, and in spite of the fact that she put on a hard right rudder and increased to full speed ahead during the few minutes preceeding the accident, she was never able to get back to windward, and crashed into the leeward side of the draw opening with the vessel on an angle, her stern down to the westward of the draw opening (Appellee's Appendix in No. 7604, p. 2, 100, 364, 366, 365, 15, 21, 73, 82-83, 135-136, 154, 161, 171-177, 182-183).

The following is the explanation given by the Captain in his deposition taken only three days after the collision:

> "Q. And it was safe at that time to give the order full speed ahead and you presumed that you could negotiate the passage?
>
> A. Yes.
>
> Q. But you didn't negotiate the passage, did you?
>
> A. No.

Q. Well, what was the error of judgment, Captain?

A. I don't know.

Q. There was an error of judgment, wasn't there?

A. No, I don't think it was an error of judgment.

Q. Well, what happened,—an act of God came in there?

A. There was an act of God in this.

Q. What was the act of God, Captain?

A. That I don't know.

Q. Was it the force of the wind that was the act of God?

A. A combination.

Q. Of what? Wind?

A. Wind.

Q. Tide?

A. Tide.

Q. A lot of freeboard?

A. Freeboard."

(Appellee's Appendix in No. 7604, p. 52). Thus is responsibility for known or predictable factors of good seamanship lightly passed on the Deity.

The Pilot himself stated that he had to put on full right rudder to bring the ship well to windward (Appellee's Appendix in No. 7604, p. 100), and that the wind and tide caught the vessel and knocked it over (Appellee's Appendix in No. 7604, p. 366): he even conceded that after giving her a hard rudder and full speed ahead there was nothing else to

do but "hope to God" (Appellee's Appendix in No. 7604, p. 365). The vessel's own Helmsman, Moss, testified that the ship was on the left hand side of the bridge approach "in a sort of angle" when he received the hard right rudder order (Appellee's Appendix in No. 7604, p. 15). The witness Higgins stated that the ship approached the bridge at an angle with her stern to the left (Appellee's Appendix in No. 7604, p. 73). The witness Gasque, who, in his outboard motor boat was trying to get ahead of the FORT FETTERMAN, testified that she began to crab off to the left or leeward and that her stern fell off to the left as she got to the draw opening (Appellee's Appendix in No. 7604, p. 135-136). The Naval Commander, expert and eye-witness, Engler, testified that the ship was crabbing over to the left as it moved into the draw (Appellee's Appendix in No. 7604, p. 154). The expert and eye-witness Navy Lt. McMurray testified that the vessel's approach was definitely with the west and that by the time she entered the bridge her stern was actually down to westward of the bridge opening (Appellee's Appendix in No. 7604, p. 171-172). The witness Wilson testified that the vessel approached at a peculiar angle because of the wind, with her stern over to the west (Appellee's Appendix in No. 7604, p. 182-183).

In spite of the foregoing testimony from the ship's own witnesses and from disinterested witnesses with maritime experience, Petitioner, after failing to convince the Trial Court and the Appellate Court that the vessel took a "sudden sheer," now tries to make this Court believe that this tremendous vessel suddenly made a perpendicular 90° sideways movment to the left of her course when she was passing through the draw. Regardless of all testimony, Respondent submits that this is palpably ridiculous and a physical impossibility. The ship's personnel had an opportunity to testify about this accident at a formal Coast Guard Hearing on the day follow-

ing the accident and on adversary depositions three days following the accident, but at no time, until the trial of the case 21 months after the accident, did the "sudden sheer" appear in this litigation.

D. THE DRAW WAS OPENED IN AMPLE TIME.

Petitioner, beginning on page 56 of its Petition, again undertakes to charge the bridge with slow opening, although the Trial Judge had found that "at the time the bridge had completed opening, the FORT FETTERMAN was at or a little north of Black Can Buoy No. C-5, which is on the port side of the channel 900 yards below the bridge", and that the bridge had completed opening anywhere from four to ten minutes prior to the entrance of the vessel's bow into the draw opening. The Court of Appeals held that Petitioner's contention of delay in bridge opening was sufficiently answered by the ship's own personnel "who unanimously affirmed that the ship had perfect steerageway and control at two knots or three knots while she was well down stream and 'killing time' awaiting the opening of the bridge. The Captain conceded that, irrespective of the alleged delay, the vessel was in good position to go through the bridge. The Pilot and Third Mate testified substantially to the same affect. The evidence of Appellant's own witnesses proves conclusively that the delay, if any, in opening the bridge had no relation to the collision".

Respondent put on some nineteen witnesses on this point, one of whom was its Bridge Tender, and one of whom was the ship's Third Mate, the other seventeen being disinterested eye-witnesses. Only a few specific instances need be cited to show the preponderance of evidence to the effect that, with respect to time and distance, the bridge had completed opening well before the vessel approached: Captain Gasgue, a veteran handler of small boats in this area, stated that when the

bridge had completed opening the ship was at the Black Can Buoy, which is 900 yards below the bridge (Appellee's Appendix in No. 7604, p. 134-135). Captain Engler, a veteran naval officer whose daily duties involved routine estimates of tide, wind, distances, etc., in this area, testified that when the bridge had completed opening the FORT FETTERMAN was even further away, below the Black Can Buoy (Appellee's Appendix in No. 7604, p. 155). Lt. McMurray, another active naval officer, expressed the view that at the time the bridge was opened completely the FORT FETTERMAN was 1200 yards below the bridge (Appellee's Appendix in No. 8604, p. 172). Other civilian eye-witnesses in automobiles on the bridge who were held up by the opening of the draw testified variously that the bridge was open 5 - 6 - 7 or 8 minutes prior to the time the vessel arrived at the draw opening (Appellee's Appendix in No. 7604, p. 111, 112, 123, 162, 166, 185, 187, 190, 193 and 196). The Captain testified that when the vessel was a quarter of a mile from the bridge it was safe to negotiate the passage, and that the ship's position and speed were safe for proceeding (Appellant's Appendix in No. 7604, p. 118). He further testified that the vessel's head was holding up and that he was in proper position in the channel in relation to the bridge (Appellant's Appendix in No. 7604, p. 119). In response to a specific question, the Captain said that at the time the bridge was fully open he was in a good position to go through, regardless of any delay prior to that time, whether there had been any or not (Appellee's Appendix in No. 7604, p. 308).

Notwithstanding all the foregoing substantial and credible evidence which has formed the basis for a finding by the trial Court and the affirmance of such finding by an Appellate Court, the Petitioner still apparently feels able to include in his Petition for Certiorari the following unfounded and unsupported statement: "There is no question but that there was delay in opening the bridge and that as a consequence the

ship's speed was substantially reduced and its momentum impaired".

E. THE FENDER SYSTEM WAS ADEQUATE.

The fender system was all that was required, and served its purpose.

On page 50, and again on page 53, Petitioner assigns to the War Department permit for construction of the bridge a requirement respecting the make-up and location of the fender system at the bridge. Respondent is more than a little surprised at this unsupported statement whereby after five years of litigation the vessel for the first time now claims that the War Department permit prescribed the quantity or quality of pilings and fenders at the bridge. Not only is there no evidence in the record supporting such a statement, but on the contrary, Petitioner's cross examination of the State Highway Department's Bridge Engineer affirmatively elicits that the fender symbols on the permit drawing were symbolic only, and that the same were not intended to show the number or size or any other details with respect to the fender piles (Appellee's Appendix in No. 7604, p. 285). One glance at the permit drawing will show that he is correct. See *Annex A*.

Petitioner's statement with reference to the "uncontradicted testimony" regarding the condition of the fender system must now again be recontradicted. Respondent's expert engineer witness, Col. L. S. LeTellier, had inspected the damage shortly after the collision, and testified that the purpose of the fender was to serve as a cushion to prevent destruction of the pier, and that this particular fender had served its purpose to a large extent because, if it had not, the terriffic impact of the FORT FETTERMAN might very well have destroyed the concrete abutment of the bridge, since the FORT FETTERMAN, because of her size and speed at the time of the

impact, was exerting a potential energy in the neighborhood of sixty million foot-pounds (Appellee's Appendix in No. 7604, p. 233, 227). The Highway Department's Bridge Engineer, W. J. Gooding, testified that no fender system could have been constructed to hold off even a "breasting action" of a ship the size of the FORT FETTERMAN (Appellee's Appendix in No. 7604, p. 284). The ship owner's expert witness, Grushky, himself admitted that even wharves were not designed to sustain the "breasting action" of a ship moving at 4 knots (Appellee's Appendix in No. 4806 p. 391). The ship owner's witness, Reggie Rudd, a diver, was apparently sent down to check the underwater portion of the fender system which was hit by the ship; his testimony not only did not prove any defects in the fender system, but on the contrary, it shows that he found the pilings he was asked to check to be "good whole piles" and unbroken all the way from the water line down into the mud (Appellant's Appendix in No. 7604, p. 217-218). Similar testimony from the witness Barstow at the second trial establishes that the fender system provided for the Ashley River Bridge was standard for bascule bridges of this type (Appellee's Appendix in No. 8023, p. 85, 102-103, 106-107). This witness indicated that if the fender system had been connected to the concrete pier, the pier may have been destroyed.

Petitioner has included in an appendix to its Petition a photograph apparently showing some barnacle encrusted portion of a fender system, but the same, insofar as Respondent is aware, has not been otherwise identified or connected to this litigation.

Respondent submits that the foregoing evidence as to the quantity and quality of the fender system is ample to constitute support for a finding that the design and location of the fender system was standard for this type of bridge, and

that the blow or impact delivered to it by the FORT FETTERMAN in the circumstances of this collision was not reasonably to be anticipated or fended off by a proper and adequate fender system, and that the force of this collision far exceeded any normal or ordinarily foreseeable impact and therefore, was to all intents and purposes, impossible to guard against. (177 F. Supp. 76, at page 83, 1959 A.M.C. 2403 at page 2414.)

The Court of Appeals agreed with the District Court's conclusion that the fender system could not have prevented contact nor, irrespective of its condition, caused the vessel to deviate and avoid contact. The duty of a bridge owner with respect to providing protective fender systems has been set forth by the Fourth Circuit Court of Appeals in *Savannah and N. Y. Trans. Co. v. Klaren Bridge Co.*, 4 C. A. 1918, 252 Fed. 499: They need only be able to withstand the ordinary usual bump, scrape, touch, or contact to the sides in the passage of the type of vessel expected to pass through the draw.

F. THE BLOW OF THE VESSEL UPON THE GEAR RACK AND GIRDER ATTACHED WAS THE DIRECT AND EFFECTIVE CAUSE OF THE DAMAGE.

The Petitioner, on page 19 of the Petition, still asserts that the damage to the bridge resulted from a collision of the superstructure of the vessel and the overhanging span. So far in this litigation, the Petitioner has not been able to convince any Court, either trial or appellate, that this contention is correct.

The Decree on the first trial very clearly determined that the first contact between the vessel and bridge structure occurred before the ship's superstructure had entered the draw opening and that this contact was at a point on the port side

of her hull about opposite her foremast a few feet below the main deck line about 135 feet aft of her stern and about 40 feet forward of her fashion plate and superstructure (see *Annex D*). This contact of the hull was with the gear rack on the downstream girder of the western bascule. On this first trial, the Court further found that the blow of the vessel's hull against the gear rack caused the downstream side of the western bascule immediately to droop, sag, and fall from its approximate 71° elevation *before the vessel's fashion plate and forward superstructure had entered the draw opening* (emphasis added), and that during that time, the vessel, being still under forward momentum, rebounded or glanced off from the abutment and fenders to her right, so that during the few seconds required for the fashion plate and superstructure to move forward to a point opposite the downstream girder, she was no longer in contact with the fender system, but was out in the clear opening between fenders. The Court further found that during these same few seconds the downstream girder fell several degrees, so that it dropped on or directly in the path of the oncoming vessel's fashion plate and superstructure. Petitioner's theory on this first trial that the bascule was still erect and undamaged at the time the vessel's superstructure came into contact with it, was rejected in favor of the finding that the blow of the vessel on the gear rack twisted the bascule girder out of the plane in which it was designed to bear weight and stress so that its compression was lost and the natural force of gravity caused it to sag or fall on or in the path of the FORT FETTERMAN'S superstructure. (155 F. Supp. 359 at 365 and 366, A.M.C. 1735 at 1744 and 1745). Respondent proved at the first trial that the vessel's fashion plate could not possibly have come into contact with the girder unless the bascule had fallen from its 71° elevation (Appellee's Appendix in No. 7604, p. 220-221).

The Court of Appeals recited the Lower Court's holding

that the damage to the bridge was inevitable after the initia contact between the hull of the vessel and the gear rack whic caused the girder to drop in the path of the vessel's super structure. The Court of Appeals further mentioned a con flict of evidence on this phase of the case, but announced that it accepted as a fact that the gear rack was broken and bent in the manner described.

On the remanded trial, the District Court stated (177 F Supp. 76 at 82, 1959 A.M.C. 2403 at 2413):

> "Eye-witness and expert engineering testimony at the first trial convinced me that the first blow of the hull of the Fort Fetterman against the gear rack and girder caused the west bascule to fall on or in front of the ship's superstructure, thereby effectively destroying the bridge and inevitably producing the damage to both bridge and vessel. Not only has there been nothing developed at the remand hearing to weaken this finding, but on the other hand, the same has been strengthened in this regard by additional expert testimony. I find, therefore that on this point the libellant has met the burden imposed by the Pennsylvania Rule."

The Court of Appeals, after appeal from the result of the District Court trial on remand, announced (278 F 2d 921 at 925, 1960 A.M.C. 1325 at 1328) that on the former appeal it had accepted as a fact the Trial Court's finding that the initial contact of ship with gear rack caused the collapse of the bascule span. Notwithstanding the Trial Court's repeated finding and its affirmance and reaffirmance by the Court of Appeals, the Petitioner tenaciously clings to his view that the vessel collided with the upright span and caused it to collapse, thereby ignoring the blow to the gear rack and its proven sequelae. A few references to the record will show the substantial evidence supporting the affirmed and reaffirmed find-

ings with respect to the falling of the bascule immediately after the blow of the vessel's hull upon the gear rack and prior to any contact between the vessel's superstructure and the bascule.

Qualified engineers presented by Respondent at both trials were unanimous in their opinion that the blow of the vessel's hull against the gear rack displaced the down stream girder from the vertical position in which it was designed to bear weight and compression and that gravity caused it immediately to commence collapsing (Engineer LeTellier, Appellee's Appendix in No. 7604, p. 215-216; Engineer McCrady, Appellee's Appendix in No. 7604, p. 268; Engineer McDonald, Appellee's Appendix in No. 7604, p. 240-242; Engineer Gooding, Appellee's Appendix in No. 7604, p. 283; Engineer Barstow, Appellee's Appendix in No. 8023, p. 93).

Petitioner, on page 25 of its Petition, baldly states that "there were no eye witnesses who could say they saw the span collapse as the result of the hull striking the gear rack . . . ". The following references to the record will dispose of Petitioner's unfounded statement in that regard. The witness, Miss Hughes, testified that the span "crumbled" when the hull of the vessel hit the west side of the bridge opening (Appellee's Appendix in No. 7604, p. 113-114), and on cross examination repeated that the span "crumpled as soon as the ship hit the concrete part . . . . the lick made the span crumple" (Appellee's Appendix in No. 7604, p. 118). Mrs. Bones testified that when the bow of the ship went through the draw and before the vessel's superstructure had come up to the draw opening, there was a screeching and scraping vibration "down below" and a sway of the bascule itself at the time of this rubbing and scraping "down below" (Appellee's Appendix in No. 7604, p. 123-124). Similarly, the witness Gasque emphasized that the bascule moved before it

came into contact with the vessel's superstructure, and in response to a question from the Court, stated that the bascule moved before the bridge of the vessel struck it (Appellee's Appendix in No. 7604, p. 142-143). The witness Engle testified that he saw the bascule of the highway bridge turn over on the left hand side "and it was just like a slow motion picture, old silent movie, the way that bridge just rolled, seemed to roll under. As it came it caught the bridge of the ship and then the mast and then finally the stack. After the ship had gone through it just fell off into the water". (Appellee's Appendix in No. 7604, p. 146). The witness Singleton testified that upon first contact between ship and bridge structure, before the vessel's superstructure had entered the draw he "saw the bascule kindly (sic) quiver; then it started to fall and twist, a twisting slow twist" (Appellee's Appendix in No. 7604, p. 201). The Pilot of the vessel himself, at the Coast Guard Hearing on the day immediately following the accident, remarked in an unguarded moment "the upper part of the bridge fell down on us." When confronted with this statement at the trial some twenty months later, the Pilot said he "might have meant something else." (Appellee's Petition for Rehearing in No. 7604, p. 56).

Respondent respectfully directs the attention of the Court to photograph Exhibit B in the Appendix to Petitioner's Petition, and suggests that the same shows very clearly the twisting or curling slow motion effect of the falling bascule and the sagging of the downstream girder, all of which had obviously occurred before the vessel had completed passage through the draw opening. This photograph, as well as Exhibit C following it, very plainly shows the angular approach of the vessel to the draw opening with its bow over to the right and its stern down to the left. By the time she had reached the position shown in Exhibit D her left rudder had brought her bow somewhat to the left.

G. THE POSITION OF THE GEAR RACK WAS NOT VIOLATIVE OF THE WAR DEPARTMENT PERMIT.

We have already noted that on the first appeal on the merits, the Fourth Circuit Court, in its first Opinion, got the impression that the position of the gear rack in relation to the face of the concrete abutment violated the permit because it did not appear on the sketch, which constituted the 'plans" required by 33 U.S. Code, Sec. 401. After granting a Petition for Rehearing, in which the Respondent vigorously contended that the location of the gear rack was not violative of the permit, the Court sent the case back for retrial to determine, among other things, if the so-called protrusion of the gear racks beyond the face of the concrete abutment constituted a statutory fault. Much testimony was taken at the second trial to determine what was required to be shown on this sketch which constituted the so-called "plans" required by Section 401.

Testimony was obtained from one Robert J. Kennedy, Chief, Miscellaneous Branch of Civil Works, Army Engineers. Kennedy's testimony established (Appellee's Appendix No. 8023, p. 6, etc.) that the Army Engineers' concern in applications of this sort, is that the proposed bridge will provide adequate opening for navigation, and that it will be of reasonable height and width. His office never sees and is not concerned with the detailed plans or shop drawings. They merely see a sketch which is ordinarily of letter size, which shows the stream, the location of the bridge, and the plan and elevation of the bridge. The sketch shows vertical clearance and horizontal clearance, and, in the case of a drawbridge, must show the span in two positions, closed and open. The Army Engineers' concern is directed to "clear width." Kennedy stated that as to clear width "generally it's between fenders" since the navigational fairway is limited by the fender system.

The witness Conway, Chief of the Legal Department in th Charleston District Engineers' Office since 1951, testified tha the primary concern of his office was the navigable openi after the bridge had been built (Appellee's Appendix N 8203, p. 64). Conway testified specifically that in the ca of the Ashley River Bridge, where the gear rack extend eighteen inches beyond the face of the concrete pier housi when the bascule was in raised position but still some 3½ fe back of or shoreward of the fender line, (indicated by the re lines on the permit) there was nothing to require the gea rack to be shown on the "plans" under his interpretation o the applicable regulations. He then stated affirmatively tha the failure to show the gear rack on the sketch did not con stitute a violation of the permit. The witness Worth Cand rick, Technical Assistant to the Charleston District Engine and the chief civilian employee of that office for many year testified that he reviewed and recommended the approval o disapproval of all bridge applications. His testimony, like tha of Mr. Kennedy, indicated that the Engineers' primary con cern is the ease of navigation through the draw expressed i horizontal and vertical clearance through the bridge (Ap pellee's Appendix in No. 8302, p. 72). He noted that the re lines on the permit are intended to outline the useabl clearance after completion of the bridge. He stated that i his opinion the regulations did not require that the gear rac be shown on the sketch accompanying the permit applicatio The testimony of these three important civilian employees o the War Department is corroborated by the testimony of th witness Roberts, who was Resident Engineer for the Sout Carolina State Highway Department in the 1920s during th construction of the Ashley River Bridge, and of the witne Williams, who, during that period of time was Inspector fo the Charleston District Engineers' Office, and of the witne Rivers, who was an Assistant Engineer during that perio

in the Charleston Engineers' Office. It was also corroborated by the witness Barstow and the witness Gooding. Barstow, who as a young engineer participated in the design of the Ashley River Bridge, has since participated in the design of bascule bridges all over the world.

The District Judge on the record in the second trial commented on the close liaison between the Army Engineers and the State Officials in the construction of so important a structure as that involved in this case. The Court noted that the work of the Army Engineers did not stop following the issuance of the permit by the Secretary of War, and on the local level, liaison of the most cooperative nature was maintained between the Army Engineers and those building the bridge. Periodic inspections were made to avoid costly mistakes and to insure that the conditions of the permit were observed. During the period of constructing the Ashley River Bridge, constant contact was maintained between the office of Army Engineers and the Engineers of the State Highway Department. At that time the Ashley River Bridge was one of the most important bridges on the Atlantic Coast and it had been much publicized both on the local and regional levels.

In connection with this aspect of the case, the Respondent produced Engineer Barstow, formerly in the employ of the Strauss Bascule Bridge Company which had designed the bascule spans. The witness stated that the contract drawings as well as the detailed shop drawings which were followed in the construction of the bridge faithfully implemented the permit. It was established that the Army Engineers, during the many inspections that were made on the progress of the work, had ample opportunity to examine the shop drawings. Proof was also offered that after the bridge was constructed, the bridge had been inspected and was certified by the Char-

leston Office of Army Engineers to the Secretary of War as having been constructed in accordance with the permit. On the basis of the facts here related, the District Court found and the Court of Appeals affirmed, that the protrusion of the gear racks from the face of the concrete abutment was not a feature affecting navigation and was not required to be shown on the sketch (plans) submitted for approval.

As soon as the question of the legality of the position of the gear rack arose in the case, the Respondent was quick to admit that if the gear rack was illegal, a case of mutual fault existed because the theory of its case from the very first had been that the destruction of the gear rack was the effective cause of the destruction of the bridge[19], but the elaborate record at the remanded trial made it clear that the Petitioner's contention that the gear rack had to be shown on the minute sketch accompanying the permit, notwithstanding that it was 3½ feet shoreward of the navigable fairway, is altogether specious.

H. THE PENNSYLVANIA RULE IS A RULE OF EVIDENTIARY PRESUMPTION THE BURDEN OF WHICH CAN BE OVERCOME BY PROVEN FACTS, AND IN THE CIRCUMSTANCES OF THE COLLISION AS IT OCCURRED IN THIS CASE SUBSTANTIAL AND CREDIBLE EVIDENCE ESTABLISHES THAT THE DRAWBRIDGE HAS MET AND OVERCOME THE BURDEN OR PRESUMPTION OF THE PENNSYLVANIA RULE, SINCE IT HAS BEEN CLEARLY SHOWN THAT THE FAILURE TO ELEVATE THE BASCULE HIGHER THAN 71° COULD

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[19]The Respondent's libel, prepared five years ago immediately after the collision, alleged inter alia that the FORT FETTERMAN ". . . . crashed into . . . . the protective fender piling . . . . struck the gear used to raise and lower the bascule span . . . . the blow against the gear and girder caused the western bascule to slowly fall . . . . " (Appellant's Appendix in No. 7604, p. 2-3).

NOT WITH ANY REASONABLE POSSIBILITY HAVE CONTRIBUTED TO THE COLLISION AND CONSEQUENT DAMAGES.

(1) THE PENNSYLVANIA RULE.

The so-called Pennsylvania Rule was pronounced in the opinion of the Supreme Court in the case of *The Steamship Pennsylvania vs. Troop*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148, decided in 1874. That case involved a collision between a bark owned by Troop and the steamship PENNSYLVANIA. The collision occurred in a dense fog. The Court first found the Pennsylvania guilty of unsafe navigation in maintaining a speed of seven knots prior to the collision. It then took occasion to consider the fog signal which had been given by the bark. The Court noted that the rules of the road require a sailing vessel when under way to use a fog horn, and when not under way to use a bell. The bark had used a bell as its warning signal, notwithstanding that she was under way and was constantly changing her position. Having reached this conclusion, the Court them made inquiry as to whether the fault of the bark contributed to the collision and whether in any degree it was the cause of the vessel coming into dangerous position. It stated that, "It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration", but it went on to say that when, as in this case, a ship at the time of a collision is in actual violation of the statutory rule intended to prevent collision, it is no more than a reasonable persumption that such fault was at least a contributing cause of a disaster. They went on to pronounce the so-called Pennsylvania Rule, which is to the effect that one guilty of a statutory fault must show that not only would the fault not cause or contribute to the cause of the disaster, but must go further and show

that the fault could not have been a primary or contributing factor.

The entire discussion made it clear that the Court was talking about a rule of evidentiary presumption. Apropos of this it said, "In some cases it is possible to show this (that the fault did not contribute or could not have contributed) with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether, if a fog horn had been blown on the bark, it would have not been heard sooner than the bell was heard, and thus earlier warning given to the steamer to have enabled her to keep out of the way". Finally, in further discussion of the facts of the case, it found that on the basis of the evidence presented to the Court, the presumption that arose when it was ascertained that the bark had given the wrong signal could not be rebutted in the case. It was on this basis that a division of damages was ordered.

Now, presumption is defined by American Jurisprudence as:

> "A rule of law that attaches definite probative value to specific facts or draws a particular inference as to the existence of one fact, not actually known, arising from its unusual connection with other particular facts which are known or proved." (20 Am. Jur. 161-.

Wigmore employs this language (Vol. IX, 3rd., p. 288):

> "Presumption. . . . is a rule . . . attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it."

Wigmore goes on to point out that the peculiar effect of a

presumption is merely to invoke a rule of law compelling the jury to reach a conclusion *in the absence of evidence to the contrary from the opponent*. If the opponent does offer evidences to the contrary, the presumption disappears as a rule of law and the case is in the jury's hands free from any rule. "Presumption," said the Oklahoma Court in *Stumpf v. Montgomery*, 101 Okla. 257, 226 Pac. 65, "may be looked on as the bats of the law, flitting in the twilight to disappear in the sunshine of actual facts." As noted in American Jurisprudence (Vol. 20, p. 163) "Where facts appear, presumptions recede."

And it should not be forgotten that there is no such thing as a "conclusive presumption". "Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case." (Wigmore, Vol. IX, p. 292).

While this Court has on occasion reaffirmed the rule, it is interesting to note that the latest expression of approval dates back nearly fifty years,[11] and an observation made by Justice Holmes in 1922 indicates that he did not attach the significance to the rule that has been given to it in this very case.[12]

At the peril of digressing, it must be noted that while in all tort cases violation of a safety statute gives rise to a presumption of negligence, it is necessary for one seeking to prevail because of the statutory violation, to prove that it caused or contributed to the resulting damage. Violation of a safety statute must meet the test of proximate cause as well as all

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[11]Lie v. San Francsico & Portland SS Co., 243 U.S. 291, 61 L. Ed. 395, 37 S. Ct. 270 (1917).

[12]White Ooak Transp. Co. v. Boston, Cape Cod & N. Y. Canal Co., 258 U.S. 341, 42 S. Ct. 338, 66 L. Ed. 649 (1922).

other delicts. Even in the instance of *res ipsa loquitur* it must be established that the negligent act presumed was the proximate cause. Nowhere else in the law of torts besides admiralty is it necessary to go further than to prove that an alleged delict was or was not the proximate or a contributing cause of resulting damage. To defend against the penalty of a statutory violation one must only establish the delict was not a proximate or contributing cause. This, of course, must be established with a degree of certainty comparable to the proof of all other facts determinative of proximate cause. But not so in Admiralty! Here one must go further and prove that the alleged statutory violation could not "*with reasonable possibility*" have been a factor in the matter. It is to be remembered that at this point in the case it will have already been established that the delict *was* not a factor; therefore, what is really being done is to wander into a never-never land of unreality to determine if the delict *might* have been factor. The unreality of the Rule has resulted in its being universally claimed "harsh".[13]

The Petitioner, however, was not satisfied in requiring the Respondent to meet the burden of the Pennsylvania Rule. The Petitioner, on page 23 of its Petition ascribes to the Pennsylvania Rule the standard of proof required in criminal cases: ". . . . the statutory violator shall establish by evidence, beyond a reasonable doubt, that the violation could not possibly have contributed to the accident," We urge that this is not the law, and that such a requirement has never been exacted under the Pennsylvania Rule by this or any Court of Appeal in Admiralty cases.

This Court has not had occasion to consider the Pennsyl-

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[13]The Ninth Circuit in a recent case described the Pennsylvania Rule as a "drastic and unusual presumption" (Pacific Tow Boat Co. v. States Marine, 276 F. 2d 745, 749, 9 C.A. 1960).

vania Rule since 1922 in the case of *White Oak Transp. Co. v. Boston ,Cape Cod and N. Y. Canal Co.*, supra, note 12. Neither of the lower courts in that case had mentioned the Pennsylvania Rule, and Justice Holmes mentioned it only to dispose of it on the ground that the fact findings below did not require the application of its penalties. Exactly the same disposition of it has been made by the Fourth Circuit in the instant case.

All of the Circuits which handle admiralty litigation have similarly held that the exaction of the penalty under the Pennsylvania Rule depends upon the fact finders' determination, within the framework of that rule, as to whether or not the statutory infringement in question could, with reasonable possibility, cause or contribute to the accident and damage.

In *Lia* (*Seaboard Tug and Barge, Inc. v. Rederi AB/DISA*, 1 C.A. 1954, 213 F. 2d 772, 1954 A.M.C.) the First Circuit clearly indicated that the inquiry as to whether or not a statutory violation could, with reasonable probability have contributed to an accident and damage was a question to be determined by the fact finder:

> "We cannot believe that the Supreme Court in *The Pennsylvania* intended to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote. Indeed, our interpretation seems to be supported by the decision in *The Umbria*, 166 U. S. 404 (1897) (and we do not see anything in *Lie vs. San Francisco & Portland S. S. Co.*, 243 U. S. 291 (1917, that militates against it) Notwithstanding the dictum in *The Martello*, 153 U. S. 64 75 (1894), that the offending ship has the burden of showing that its statutory fault "could not by any pos-

sibility have contributed" to the collision, we nevertheless feel that in applying the Rule of the Pennsylvania we are limited to the reasonable probabilities." *The Mabel*, 1929 A.M.C. 1688, 35 F. (2d) 731, 732 (2 CA, 1929). And even assuming that a danger signal by the *Lia* a minute earlier than the one she gave could have told the master of the *Seaboard* anything with respect to the danger he was in from the vessel he clearly saw approaching and had signaled to, still it must be evident from the proximity of the vessels and the slow speed and lack of maneuverability of the tug-barge unit that the extra minute in all reasonable probability could not, as the District Court found, have given time for the latter to escape from the dangerous position in which it had placed itself."

Certiorari was not sought in this case.

The Second Circuit, in *Nashbulk - Rutgers Victory*, (*National Bulk Carriers v. United States*, 2 C.A. 1950, 183 F. 2d 405, 1950 A.M.C. 1943) made a similar determination with respect to the conclusions of the fact finder and invocation of the Pennsylvania Rule:

"We are, however, inclined to accept the view that where, as here, the unsignalled change of course could not have been a contributing cause of the collision, the fault in failing to give the signal required by Article 18, 33 U.S.C.A. Sec. 103, cannot be held a contributing cause. In other words the Nashbulk, not being required by statute to warn the Rutgers Victory of her presence nor so required by the dictates of prudent navigation since she could take it for granted that her presence was known, was under an obligation imposed by Article 18 only to indicate her change of course to give timely notice of that. She has discharged her burden under the rule of The Pennsylvania, supra, co-extensive with her obligation un-

der Article 18. She cannot therefore be forced to pay half the damages merely because the other vessel was so grievously at fault that she needed, and might have put to good and effective use, an alerting signal which the rule did not require. Indeed, to allow that would simply put a premium upon gross negligence in navigation, for had the Rutgers Victory not been 'as blind as one who will not see' no alerting signal would have been of any use and the exoneration of the Nashbulk would have followed almost as a matter of course."

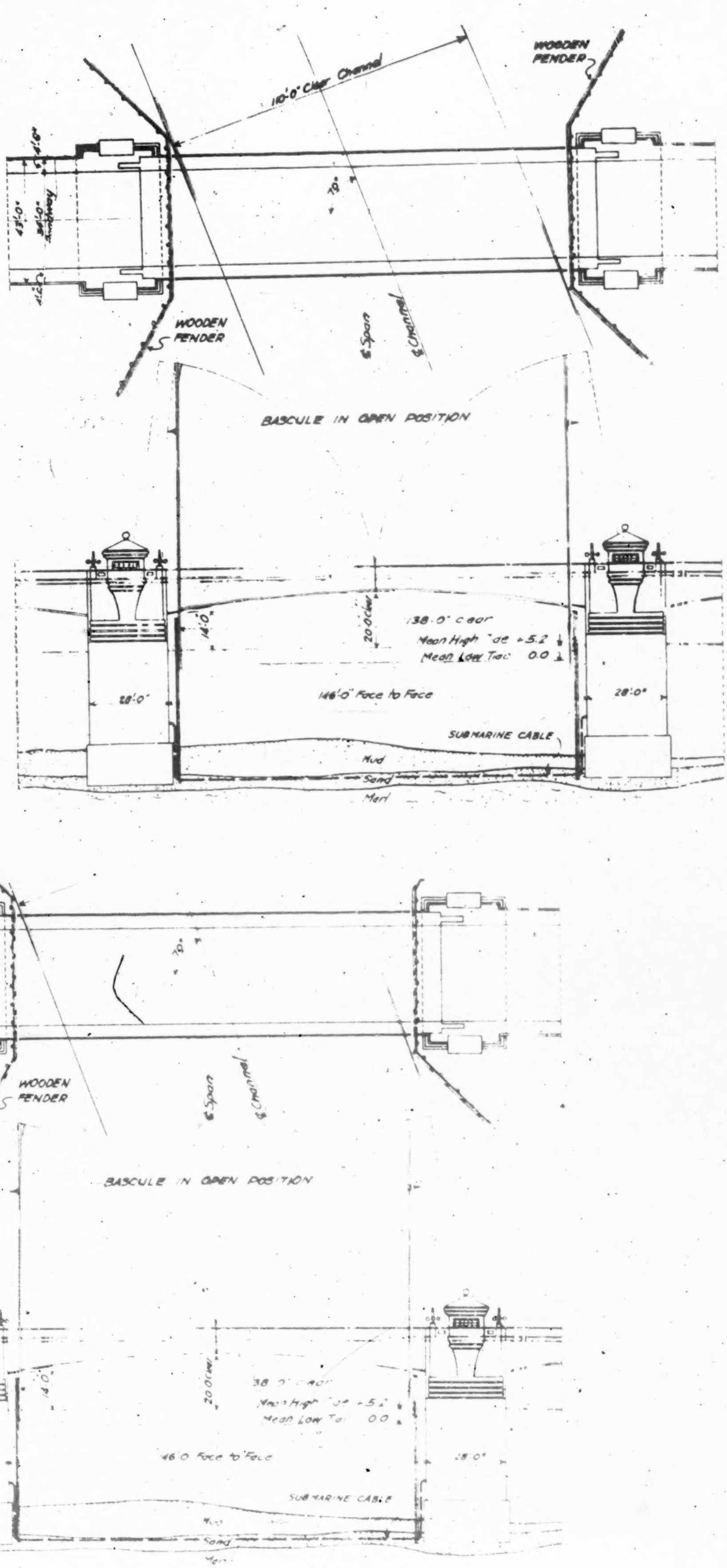
This Court denied certiorari. 340 U.S. 865, 95 L.Ed. 631, 71 S.Ct. 89.

The Second Circuit again in 1952 made a similar holding in a per curiam opinion in the case of *William J. Riddle* (*United States v. United States Lines Co.*, 2 C.A. 1952, 200 F. 2d 608, 1953 A.M.C. 132):

"The only possible doubt is whether the American Farmer's statutory fault in failing to signal when she turned five degrees to her right is enough to fasten contributory fault upon her. Judge Kaufman found that it could not have contributed to the collision. We think he was right. See National Bulk Carriers v. United States, 2 Cir., 183 F. 2d 405, 409, certiorari denied Burns S. C. Co. vs. National Bulk Carriers, 340 U.S. 865. 71 S. Ct. 89, 95 L. Ed. 681. The decree is affirmed on the opinion below."

Certiorari was not sought in this case.

The Second Circuit again in 1955 refused to apply the Pennsylvania Rule blindly, because the facts did not justify such application. In S.S. *Shell Bar* (*Automobile Insurance Co. v. United Fruit Co.*, 2 C.A. 1955, 224 F. 2d 72, 1955 A.M.C. 1429) that Court stated that it was unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for



ENLARGED PLAN AND ELEVATION OF MOVABLE SPAN

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proof of cause and that in any event, in the situation involve in that case, ". . . libellants can have no recourse to the doctri of statutory fault because there is lack of evidence here th any statutory fault was the proximate cause of the fire". Ce tiorari was denied in this case. 350 U.S. 885, 100 L. Ed. 78 76 S. Ct. 138.

The Second Circuit again in 1958 deferred to factual find ing in refusing to apply the sanctions of the Pennsylvania Rul In *Russel. Poling No. 29 - Corporal (Russel, Poling & Com pany v. Conners Standard Marine Corp.*, 2 C.A. 1958, 252 F 2d 167, 1958 A.M.C. 1093) the failure to provide a statutor lookout was held on the facts to have no connection with th accident:

> "In the case at bar, the pilot of the tug stated that n lookout was needed. Clearly, there was no showing tha if there had been a lookout, the accident would have bee in any way prevented."

Certiorari was not sought here.

The Third Circuit, although not mentioning the Pennsylvani Rule specifically, has arrived at the same result in applyin or not applying the penalties of statutory violation, dependin on the facts proved and found. In *Mohawk - Hartford (D Dougherty Co. v. United States*, 3 C.A. 1952, 207 F.2d 62 1953 A.M. 1541) that Court held, in a divided opinion:

> "It is the general long-established rule in collision case that:
>
> 'Where fault on the part of one vessel is established b uncontradicted testimony, and such fault is, of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the man agement of the other vessel.'

(Citing cases).

In applying the rule stated, it has frequently been held that even a prior act of negligence does not 'contribute' if it merely creates a 'condition' which makes it possible for the subsequent negligence of the other vessel to bring about a collision. Under the cases the earlier fault is held to be merely a 'condition' and not a 'cause' of the collision . . . . the fault of the vessel sought to be charged must be a 'cause' and not a 'condition' of the collision and the position of a vessel in navigation though 'unlawful' and a 'maritime fault' does not in and of itself make her liable and in order to be held, her position must be the 'cause' of the accident and not merely a 'condition' with respect to it.

In accordance with the principles stated the Courts have time and again absolved from liability vessels which had transgressed statutes requiring their navigating in mid-channel or mid-stream or had executed 'unjustifiable' maneuvers where the facts demonstrated that their conduct was merely a 'condition' and not a 'cause' of an ensuing collision."

Certiorari was denied by this Court. 347 U.S. 912, 98 L. Ed. 1068. 74 S. Ct. 476

The Fourth Circuit. where this litigation arises, in *Dixie B - Dewey*, (*Webb v. Davis*, 4 C.A. 1956, 236 F. 2d 90, 1956 A.M.C. 1789) in an opinion by Judge Soper stated:

"The requirements of The Pennsylvania rule must be strictly enforced for the safety of navigation, but it should not be pressed to such an extreme as to justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated."

(Citing cases).

Certiorari was not sought.

The Fifth Circuit has made similar determinations and reversed the District Court in *Star of Honduras - Queenston Heights*, (*Compania de Maderas de Caibarien, S. A. v. The Queenston Heights*, 5 C. A. 1955, 220 F.2d 120, 1955 A.M.C. 797). Circuit Judge Holmes, in his opinion for the Court, found that the failure to have a lookout on one vessel did not actively contribute to the cause of the collision, and held that the contrary finding by the District Court was clearly erroneous. The opinion points out that speculation would be necessary in order to connect the statutory violation with the collision and announces agreement with the First Circuit in the language hereinabove quoted from *Lia - Seaboard Tug & Barge* to the effect that the Pennsylvania Rule was not intended to burden every statutory violator with establishing that its fault could not by any stretch of the imagination have any causal relation to the collision, no mattter how speculative, improbable or remote. Certiorari was denied. 350 U.S. 824, 100 L.Ed. 736, 76 S.Ct. 52.

The Fifth Circuit again in 1955 reversed a District Judge for erroneously applying the "harsh" Rule of the Pennsylvania. In *Ruby O - Fella C*, (*Koch-Ellis Marine Contractors v. Chemical Barge Lines*, 5 C.A. 1955, 224 F.2d 115, 1955 A.M.C. 356 Chief Judge Hutcheson and Judges Jones and Christenberry in a per curiam opinion, reiterated the views of that Court as set forth in *Queenston Heights*, supra. It appeared that the District Judge had applied the Pennsylvania Rule reluctantly under a feeling of compulsion to enforce it as he thought it applied, his reversal is based on the ground that the facts as found by him did not require application of the Pennsylvania Rule, so as to burden the offending vessel with establishing that its fault could not, by any stretch of the imagination

have any causal relation to the collision. No certiorari was sought in this case.

The Fifth Circuit in 1957 was again very outspoken on the question of the Pennsylvania Rule. In *Evelina - Edward T*, (*Green v. Crow*, 5 C.A. 1957, 243 F.2d 401, 1957 A.M.C. 726) Judge Jones, speaking for that Circuit, states the doctrine of the Pennsylvania case and goes on to say:

> "This is not a rule of liability. It creates a shifting of the burden of proof as to causation. The Aakre, 2 Cir., 1941, 122 F. 2d 469, certiorari denied Waterman v. The Aakre, 314 U. S. 690, 62 S.Ct. 360, 86 L.Ed. 552. Where neither vessel has strictly complied with the statutory rules, and such is the case before us, we have said that
>
> > 'All of these presumptions, in the final analysis, are mere aids to the court in getting at the right of the matter, and their relative weight must depend upon the circumstances of the particular case.' Coyle Lines v. United States, 5 Cir., 1952, 195 F.2d 737, 739.

Certiorari was not sought in this case.

The Ninth Circuit, like all the others handling admirality litigation, has deferred to fact finding in respect to the statutory fault rule. In *Crowley - Patrick*, (*Crowley Launch & Tugboat Co. v. Wilmington Transp. Co.*, 9 C.A. 1941, 117 F.2d 651, 1942 A.M.C. 449) the Tug Crowley sought to fasten absolute blame for the damages on the Patrick by charging her with failing to blow the required signals on putting her engines astern. The Ninth Circuit said:

> "... If this be fault it did not contribute to the collision in view of the abundant passing room. The three blast whistle is not a warning signal. That signal is four or more short blasts. Inland Rules, Art. 18, Rule III. A master cannot be charged with causatively contributing to a col-

lision by failing to blow the full astern signal when, in the circumstances, his reversing would not affect the navigation of an approaching vessel, because, if blown, might have operated as a warning signal to that vessel which, without his knowledge, was violating the Ariadne (lookout) rule."

No certiorari was sought.

The Ninth Circuit again in 1953 spoke on this subject in *Kiska-Mayrower*, (*Oaksmith v. Garner*, 9 C.A. 1953, 205 F.2d 262, 1953 A.M.C. 1021) Kiska contended that failure of Mayflower to give statutory whistle signals rendered her liable for half damages under the Pennsylvania Rule, and the Court said:

"Even assuming *arguendo* that the position of the vessels at any time during their respective and relevant movements brought the application of Rule V in operation, the failure of the Mayflower to give the 'bend' signal has satisfied the burden enunciated in The Pennsylvania, supra. The testimony of Captain Ellis shows that he had seen the Mayflower in time to avoid the collision if both had kept to their original courses, so that the failure of the Mayflower to give the 'bend' signal could not have been a contributing cause. The trial court found that the Kiska was the deviating vessel causing the disaster."

No certiroari was sought in this case.

In 1960, the Ninth Circuit, in *Pacific Tow Boat Co. v. States Marine*, supra (footnote 13), again said:

". . . The words 'could not have,' as used in this rule, do not require the vessel guilty of a statutory fault to prove that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable, or remote. Seaboard Tug

& Barge, Inc. v. Rederi, AB/DisA, 1 Cir., 213 F.2d 772, 775. But they do cast upon such vessel the burden of establishing that the violation could not reasonably be held to have been a proximate cause of the collision. States Steamship Co. v. Permanente Steamship Corp., supra. 231 F.2d at page 87."

Certiorari was not sought in this case.

Lastly, the Second Circuit in May of 1960 decided a case strikingly similar to the instant case. In *Tidewater Pipe Co. v. Dredge Crest*, 2 C.A. 1960, 278 F.2d 489, 1960 A.M.C. 1419, District Judge Walsh's finding of fact, that a variation of two feet in the depth prescribed for a pipe line by an Army Engineer's permit did not contribute to the damage caused to the pipe line by the Dredge's digging mechanism, was affirmed. As in the instant case, apparently, the Pennsylvania Rule was not called to the attention of the Trial Court, and Judge Swan's opinion concludes as follows:

"The second error of law claims that the rule of *The Pennsylvania*, 86 U.S 125 (1874), should have been applied, since the permit required that appellee's pipeline be at a minimum depth within the channel of 42 feet below mean low water, and the court found that actually it was only 40 feet. The contention is without merit. Not only was the rule not called to the court's attention, but the variation from permit depth was proved not to have been a contributing cause of the pick-up of the pipeline outside the channel."

Private correspondence with the successful advocates in this case indicates that the losing party did not seek certiorari.

(2) THE APPLICATION OF THE PENNSYLVANIA RULE IN THE INSTANT CASE.

In obedience to the directive of the Court of Appeals which

ordered it to "make a specific finding in the light of the Pennsylvania Rule," the District Court undertook to determine whether the failure of the Respondent to raise the bascule to a required 80° angle "could have reasonably caused or contributed to the collision and the resulting damage." The District Court found as facts:[14]

> "The first blow of the hull of the FORT FETTERMAN against the gear rack and girder in question effectively destroyed the bridge and inevitably produced the damage thereto.
>
> The gear rack moves in a constant arc and beyond a bridge elevation of about 50° would have presented the same amount of protrusion at any bascule elevation up to the limits of opening; had the bridge been elevated to 80° or 82° at the time of this accident, instead of 71° as it was, the amount of gear rack protrusion would have been the same, but the impact of the vessel would have been against a different section of the gear rack, about a foot or so below the actual point of contact. Thus at 80° or 82° elevation, the blow of the ship would have struck a portion of the gear rack further away from the cross-frame or stiffener which joins the downstream girder to the upstream girder at the point of the live-load shoe. The resistance of the girder and gear rack to torsion and horizontally-applied force progressively decreases as the distance from this cross-frame or stiffener increases, and, therefore, the likelihood of collapse of the bridge would be greater at the higher elevation. In any event, the fact that the bridge was elevated to 71° instead of 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would

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[14] Appellant's Appendix in No. 8023, page 16, paragraphs 4 and 5

have been sustained whether the bridge had been elevated 61', 71', 80', or 82'."

In so doing, the District Court did not make inquiry as to whether, had the FORT FETTERMAN made a different and perhaps parallel approach, a collision would have resulted from the 71° angle of the bascule, nor did it undertake to try to find what might have happened had the approach been on a different day and under different conditions of wind and tide. It considered the failure of the Respondent to raise the bascule to 80° together with all the rest of the evidence in the case and on that basis determined if the Respondent had, with reasonable possibility, overcome the presumption that the lower elevation did or could have caused or contributed to the collision and resulting damage. This is obviously the correct way to treat the matter unless the Pennsylvania Rule is going to be converted from a rule of evidentiary presumption to a rule of absolute liability, in which event it would be only necessary in any case to establish that a statutory fault existed. The discussion of the Rule itself shows that such was never intended. Therefore, so long as it continues to exist as a Rule, it must be applied to the determined facts of the particular case at bar, and not to an ideal situation, conjured up by the litigant claiming the benefits of the Rule wherein his conduct is fault-free and the only fault considered is that of the statutory violator. The limited speculation required by the Rule must not be enlarged lest Courts of Admiralty become crystal-ball gazers instead of finders of facts.

(3) PROOF SUPPORTING THE FINDINGS THAT THE RESPONDENT BRIDGE HAS MET AND OVERCOME THE BURDEN AND PRESUMPTIONS OF THE PENNSYLVANIA RULE IN THIS CASE.

On the second trial, a conflict in the testimony resulted from the attempt on the part of the Petitioner to prove and

the Respondent to disprove the fact that the angle of elevation could have, with reasonable possibility, caused or contributed to the destruction of the bascule. State Highway Bridge Engineer Gooding, and Respondent's experts Barstow and McCrady, each testified that in their opinion there was no reasonable possibility that the destruction of the bascule which occurred at the angle of 71° would not have occurred had the bridge elevated to an angle of 80° or 82°. The Petitioner's witnesses, Grushky and Collard, were of different opinions. To sustain the prevailing theory the Respondent's witnesses pointed out that had the bridge been raised to a higher angle, the point of contact on the gear rack would have been at a position which would have offered less resistance to the FORT FETT. RMAN than at the point of the gear rack at which the contact actually occurred. At an angle of elevation of 80° the impact would have been a foot or more further away from and below the cross-frame or stiffener running between the two bascule girders at the position of the live-load shoes. (See *Annex B*) These witnesses testified that the resistance of the raised girder to torsion or horizontal force becomes progressively less as the distance from the cross-frame or stiffener increases, and it was their opinion that the likelihood of the blow causing the collapse of the bridge at 80° or 82° would be greater than at 71°. It should not be overlooked that the witness Barstow had expert knowledge of the Strauss bascule and had participated in the design of this very bridge. While the witnesses Grushky and Collard had different opinions from those expressed by the Respondent's witnesses, the District Court resolved the matter on the basis of credibility. He stated: "Here again the question is one of credibility. My decision for the Libellant is based on the clear and convincing reasoning of the witnesses."

If the Pennsylvania Rule is to continue to exist as a rule of evidentiary presumption imposing upon the party guilty

of statutory fault the burden of going beyond proof that the statutory fault did not contribute to the accident and showing that the statutory fault could not, with reasonable possibility, contribute to the result, then one has to resort to supposition to meet this extraordinary burden. But the inquiry is limited to the factual question of what might have reasonalby ocurred under the circumstances of the case, and on remand the Respondent did not have to prove once again that a collision took place and that the particular point of contact was the gear rack. Those facts had been resolved. Consequently, the only inquiry to be made was what might reasonably have happened had the bascule arm been raised to 80° or 82°. We submit that in the record here the Respondent has met this unusual burden with clear and convincing proof.

III. CONCLUSION

All told, this case has consumed some three weeks at the trial level and there have been four appellate arguments on the merits. The Trial Judge, of course, heard and saw every witness except the few whose depositions were used, and was therefore in position to judge their credibility. Respondent's presentation of the actual occurrence of the collision was made by disinterested witnesses, some of whom were motorists held up on the bridge when the draw opened, and some of whom were sea-going Navy personnel on moored Navy vessels or ashore at the nearby Naval Minecraft Base. Petitioner's witnesses as to the occurrence of the collision, however, were drawn from those in charge of and responsible for the management of the FORT FETTERMAN; Petitioner did not produce a single eyewitness from the numerous persons on the bridge nor from the Navy Minecraft installation.

These observations are made for the purpose of emphasizing that this case, like all collision cases, should be and has

been decided on the basis of the facts surrounding the collision which have been accepted by the trier of those facts. Presumptions play a part in some collision cases, true, but these too must be tested against the crucible of facts, and if the accepted facts overcome the presumptions, presumptions must go out of the case.

Early in the litigation, Respondent lost the benefit of the valuable presumption of negligence against a moving vessel which collides with a stationary bridge; this loss resulted from the *fact* that the stationary bridge was in partial violation of its War Department permit (failure to elevate to 80') and therefore was not entitled to the benefit of this presumption.

Similarly, *facts* developed in the litigation now deprive Petitioner of the benefits initially claimed under the presumption of the Pennsylvania Rule. Facts accepted by the Trial Court and affirmed by the Appellate Court below find ample support in the record in the form of credible evidence, and these facts dispel and dissipate any presumptions arising from alleged statutory violations: (a) The FORT FETTERMAN was negligently managed on her approach to and transit of the bridge; (b) the bridge was opened and ready for the passage of the FORT FETTERMAN in ample time and there was no violation of the statutory requirement of timely opening; (c) the gear rack's position did not violate the permit and the blow of the FORT FETTERMAN against it is what effectively destroyed the bridge; (d) the fender system provided was adequate for its intended use; (e) failure to elevate the bascule to 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or damages *in this accident* because these damages would have been sustained even if the elevation had been to 80° or 82° as required by the permit.

Respondent respectfully submits that the Petition for Certiorari should be denied because this matter involves no special or important reasons for review by this Court:

(1) The decision below by the Fourth Circuit is in no conflict with decisions in other Courts of Appeals; on the contrary, it is in accord with all the other Admiralty Circuits in that facts govern the application or non-application of the severe sanction of the Pennsylvania Rule.

(2) No important question of federal law is here involved. This is no more nor less than another collision case that has been thoroughly examined below.

(3) The decision below is in no way conflicting with applicable decisions of this Court; it is in accord with *White Oak Transp. Co. v. Cape Cod*, etc., supra.

(4) There has been no departure from the accepted and usual course of judicial proceedings; as noted, this is simply another collision case which has been examined and re-examined below.

Respectfully submitted,

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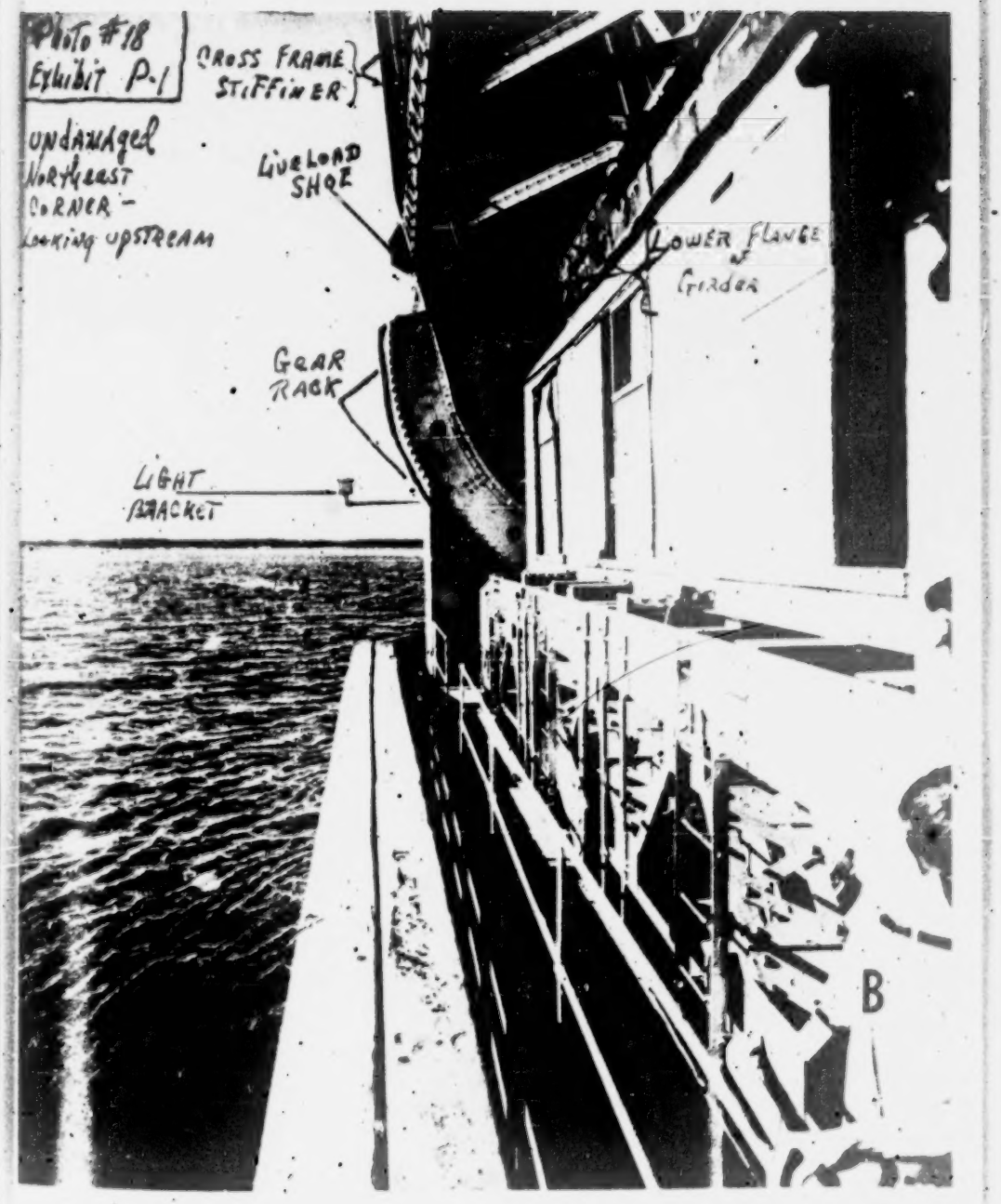
Photo #18
Exhibit P-1
undamaged
Northeast
corner -
looking upstream
CROSS FRAME STIFFINER
LIVE LOAD SHOE
LOWER FLANGE of GIRDER
GEAR RACK
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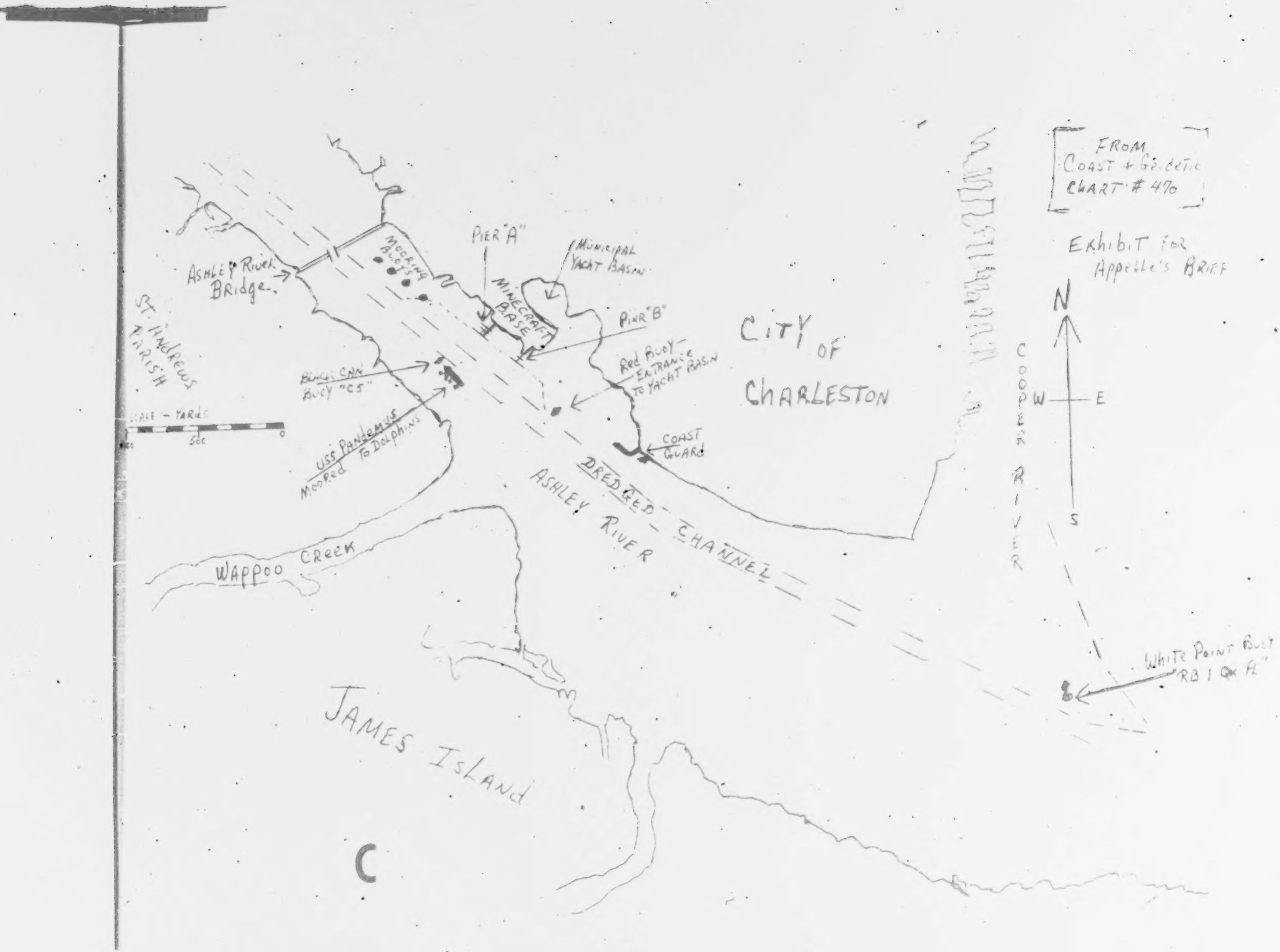
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APPELLE'S BRIEF
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ASHLEY RIVER BRIDGE
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MUNICIPAL YACHT BASIN
MINECRAFT BASE
PIER "B"
RED BUOY — ENTRANCE TO YACHT BASIN
BLACK CAN BUOY "C5"
USS PANTEMUS MOORED TO DOLPHINS
COAST GUARD
DREDGED CHANNEL
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JAMES ISLAND
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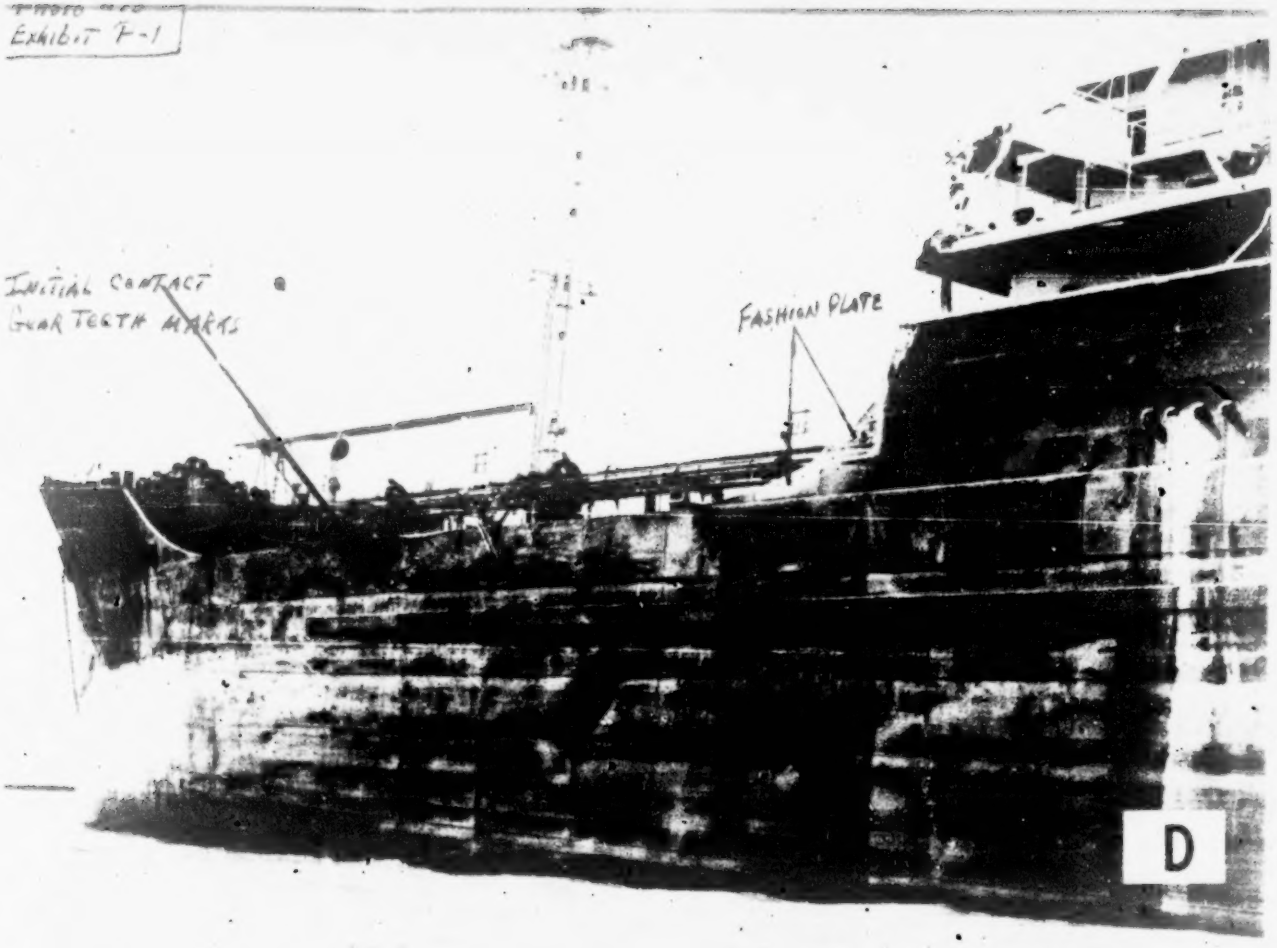
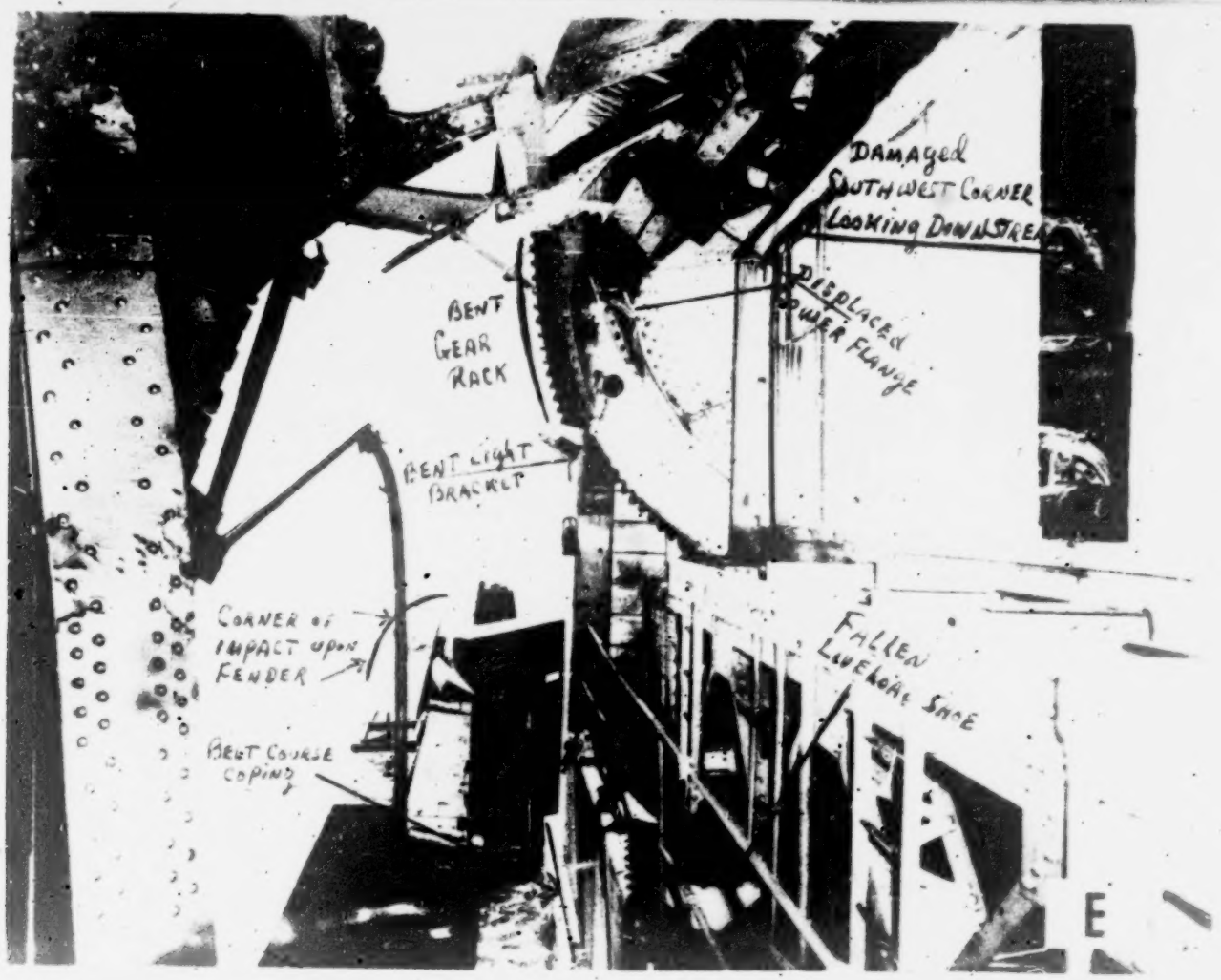
PHOTO NO.
EXHIBIT F-1

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Reply Brief of Petitioners on Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

ing blow would be "relatively severe." (Appellee's Appendix No. 7604, pp. 401, 402, 403.)

By referring to such a collision as "imaginary," the Highway Department's brief neatly overlooks the fact that the violation of the Secretary of War's permit in raising the Bascule spans to only 71 degrees instead of 82 degrees put the "negligent" vessel on a collision course with the draw span. The Highway Department implies that the draw may be diminished and obstructed *above* the water line with impunity so long as the "clear" area between fenders *at* the water line is left mathematically open for the passage of the vessel through the draw.

From the outset of this case we have never contended that the FORT FETTERMAN may with impunity run into a structure across a navigable stream merely because such movable spans exist in violation of law. However, we do contend that the ship has a right to expect that a structure across a navigable stream has been constructed and will be maintained in accordance with law. If the vessel is to be held to strict accountability for its navigation, the bridge must also be held accountable. Every part of any bridge constructed across a navigable stream which is not constructed and maintained in strict conformity with the provisions of an Act of Congress and in strict accordance with permission granted by the statutory officials is an unlawful obstruction to navigation, the right of navigation being paramount, and the bridge owner is responsible for the consequences of a collision with it, unless the bridgeowner can show unequivocally that its noncompliance could not possibly have contributed to the disaster. *United States* v. *Norfolk-Berkeley Bridge Corp.*, 20 F. 2d 115. As this Court observed in *The Pennsylvania*, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, "Such a rule is necessary to enforce the mandate of the statute."

the ultimate conclusion, whether on the whole record the bridgeowner's violations of law could not, with reasonable possibility, have contributed to the disaster, is a question of law since only by application of the proper legal standards can the conclusion necessitated by the rule be properly drawn. It is well settled that causative negligence or the ultimate finding as to liability-creating fault is but a legal inference from other facts and is subject to review. *The E. A. Packer*, 140 U. S. 360, 35 L. Ed. 453; *Verbeeck v. Black Diamond Steamship Co.*, 2nd Cir., 1959, 269 F. 2d 68, 70.

The brief of the Respondent in opposition to the Petition for writ of certiorari is replete with extravagant assertions as to the proof for the establishment of so-called "facts." It is not our purpose to burden this reply brief with a clarification of every item of speculation which the Respondent labels a "fact," but we do feel that we should point out to the Court the factual distortions affecting the legal determinations which this Court is asked to review.

ARGUMENT

I. The Courts below have misapplied The Pennsylvania rule in concluding that the Highway Department has borne the burden of establishing that its statutory violation could not have contributed to the disaster.

Essentially it seems to be the contention of the Highway Department that since the District Court "found" that the statutory violation resulting from the failure to lift the bascule span to the required height could not possibly have caused or contributed to the collision and consequent damages that "fact" has been established and may not be reviewed on appeal. It has been stated by the Highway Department that we have contended that a statutory violation im-

poses upon the violator absolute liability, whereas the correct legal principle is that a statutory violation merely creates a presumption that the violation was causally connected with the disaster. The Highway Department then contends that since the presumption may be rebutted by the factual establishment of lack of causal connection between the disaster and the violation, this "fact" is to be determined by the preponderance of the evidence and, when so determined by the trial court, must be accepted on appeal unless found to be clearly erroneous.

We have never contended that a statutory violation creates absolute liability to the violator, but we do not agree that the violation creates merely a presumption of causal connection which may be rebutted by a preponderance of evidence to the contrary. If this is not so, then the burden imposed by the *Pennsylvania* rule upon a statutory violator would be to establish that the violation *probably* had no causal connection with the disaster and would not be to establish that the violation *could not possibly* have contributed to the same. The statement of the rule by this Court in *The Pennsylvania v. Troop*, 19 Wall. 125, 86 U. S. 127, 22 L. Ed. 148, is rendered meaningless by the conception of its application asserted by the Highway Department.

We believe that the *Pennsylvania* rule requires the statutory violator to show by clear, convincing and unequivocal evidence that the violation could not, with any reasonable possibility, have been causally related in any degree to the disaster. So long as there remains a reasonable doubt from evidence in the record as to whether the violation may have contributed to the disaster, then the burden has not been borne by the violator and the statutory fault is presumed to have contributed to the disaster. The establishment of the

ultimate fact in relation to this question differs from that required in the ordinary tort case, in that subsidiary facts which might ordinarily be sufficient to support a factual finding of causation in a negligence action would not be sufficient to satisfy the burden imposed in admiralty upon a statutory violator to establish lack of causation of the violation. This proposition is well stated by Judge Learned Hand in *Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F. 2d 737, 739, when he states as follows:

> Ordinarily we should accept the judge's finding that the failure to set sufficient lights "did not in fact cause the accident," but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a "statutory" rule intended to prevent collisions * * * the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." This doctrine or its equivalent—concerning the absence of a lookout—we have applied in many decisions (Cramp cases). It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6000 feet, the "Lion" would nevertheless have failed to act in season, especially when it needed so little added time to clear the "icebreaker".
>
> The decree will be modified to award the libellant only half damages.

The Highway Department contends that since there was "credible evidence" to support the District Court's finding that the admitted statutory violation resulting from raising the bascule span to 71 degrees rather than to the permit re-

quirement of 82 degrees was not causally connected with the collision, the appellate Court may not go behind the finding to impose the "harsh" requirement of *The Pennsylvania* rule. The so-called credible evidence was, so it is said, that a blow to the gear rack "caused" the span to begin to sag before it collided with the vessel's superstructure. So it is reasoned that the collision between the superstructure and the span would have occurred if the span had been mutually raised to 82 degrees rather than to 71 degrees. In this way there is eliminated from consideration, as a causative effect upon the disaster, the collision, which unquestionably occurred, between the vessel's superstructure and the span. This is the same illogic which this Court disposed of in *The Pennsylvania*, supra, when querying whether the collision would have *not* occurred "if the bark had obeyed the navigation regulations.":

> If it be said this is speculation, it may be admitted; but it is a speculation rendered necessary by a certain fault of the bark. It is equally speculative to conclude that the collision would have taken place if a fog-horn had been used instead of a bell, *and infer therefrom* that the fault of the bark had no relation to the disaster. ** (Emphasis added)

Proctors for the Highway Department contend that "when facts appear, presumptions recede", and they repeatedly state in their brief as if the Petitioners' case is merely predicated on a naked presumption. That is not the case. The evidence cited in the record establishes reasonably the violations, in relation to the disaster. That being the case, it cannot be concluded beyond reasonable doubt that the violations had no relation to the disaster.

From the outset it has been the theory of the H

standing on the bridge when the collision occurred said that the vessel bounced or rebounded or veered off after it collided, but none of these witnesses attempt to say that this rebounding occurred in the 4-second interval between the blow to the gear rack and the striking of the span by the vessel's midship house or superstructure. Undoubtedly there was a movement of the vessel away from the fender after the collision, as shown by the photographs identified as "C" and "D" in the appendix to our Petition, but to infer that this movement occurred prior to the collision between the span and the vessel's superstructure is pure speculation without evidenciary support. Furthermore, no witness attempted to give an admeasurement of the extent of the rebounding and none suggested that the vessel was out of contact with the fender prior to the collision between the span and the vessel's superstructure. Without such supporting testimony, the proctors for the Highway Department posed a question to their engineer witness LeTellier which assumed that immediately upon striking the gear rack the ship rebounded "until the ship reached a position which was adjacent to the face of the fender, with the fashion plate of the ship opposite to the position of the downstream girder and rack" and then asked whether there could have been contact between the downstream girder and the fashion plate unless the span had fallen from its original elevation of 71 degrees, to which the witness, of course, replied that it could not have done so (Appellee's Appendix No. 7604, pp. 220-221).

As stated above, several of the members of the ship's personnel testified that there was no sagging of the span until it was struck by the ship's superstructure, and this testimony is supported by the testimony of the Highway Department witness, Colonel Hawkins, to the same effect (Appendix of Appellants No. 7604, pp. 65, 66). Miss Hughes, in saying

that the span crumpled when the hull of the ship hit the "concrete part", makes it clear that from where she was standing this was merely an assumption because she could not actually see the contact at all and, particularly, she did not see any collision between the superstructure and the span (Appendix of Appellee No. 7604, pp. 116, 117, 118). Mrs. Rones stated that the first contact occurred before the superstructure entered the opening, but she does not attempt to say that the span collapsed as the result of this first blow and emphasizes that the span did not immediately start to fall (Appendix of Appellee No. 7604, p. 125). Mr. Gasque was in a row boat with the photographer who snapped the pictures of the collision, and stated that he could not see the lower part of the span and that the span started to fall after it struck the ship's bridge (Appendix of Appellants No. 7604, pp. 60 and 61). Commander Engler (some 900 to 950 yards from the collision) could not see the port side of the vessel when the collision occurred and said that the only part of the collision that he could see "was that the platform of the bridge, the draw bridge—well, it peeled the port side of the ship's bridge as it came past"; whether there was any other contact, he could not say (Appendix of Appellants' Reply Brief No. 7604, pp. 12-a, 13-a).

The physical facts, even more than the eye-witness accounts, clearly negative the contention of the Highway Department that the span was in a sagging condition before it struck the ship's superstructure. A photograph of the damage to the midship house or superstructure taken from the forward part of the ship (Defendant's Exhibit DX-4, shown as "A" in back of this brief) shows clearly the angle at which the object stood which struck the midship house and its fashion plate. The engineer witness Grushky testified that he was able to measure and compute mathematically the angle at which

the object stood and that this angle was 71 degrees (Appellants' Appendix No. 7604, p. 276). It is significant that there is not one word of testimony in the entire record to refute this statement by Mr. Grushky, or the accuracy of his trigonometry. It might also be said that it is equally apparent from this photograph that if the span had been at an angle of approximately 55 degrees, there would appear upon the superstructure a damaged area extending very nearly to the wheelhouse amidships (i.e., center of the ship's bridge), whereas the damaged area is confined to the extreme port corner of the ship's bridge, which was carried away. Moreover, the testimony is that, with the vessel breasting against the fenders, the rivets and girder of the overhanging bascule at 71 degrees would contact the fashion plate of the midshiphouse and cause the marks thereon shown by this photograph (Appellants' Appendix No. 7604, pp. 270, 276).

The experts for the Highway Department who testified that a blow to the gear rack caused the collapse of the bascule span stated that this conclusion was founded upon the evidence that the flange of the girder opposite the gear rack buckled on one side and tore upon the opposite side (Appendix of Appellee No. 7604, pp. 212, 213, 240, 241, 242). What these experts overlooked was the fact that the girder at this point buckled from compression on the upstream side and tore from tension on the downstream side (Defendants' Exhibit D-U and Appendix of Appellants No. 7604, pp. 264, 265). The uncontradicted testimony of the engineer witness Grushky is that if the blow which caused the collapse had come at a point opposite the gear rack, the flange of the girder at that point would have buckled from compression on the downstream side and would have torn from tension on the upstream side, whereas if the blow which caused the collapse had occurred at a point higher up on the girder

(such as the collision with the ship's superstructure) the collapse of the upper portion of the girder which followed would press down the lower portion of the flange, causing it to buckle in an upstream direction and to tear in a downstream direction (Appellants' Appendix No. 7604, pp. 265, 266, 267, 268, 269). Mr. Arthur Collard, also an experienced civil engineer engaged in designing and building bridges for many years, corroborated Mr. Grushky. (Appellants' Appendix, No. 8023, p. 116). Since the flange of the girder opposite the gear rack did buckle in an upstream direction and did tear in a downstream direction, this physical fact is enough to establish the possibility, if not the probability, that the blow from the illegally positioned bascule span upon the ship's superstructure caused or contributed to the damage, especially when the Highway Departments' engineers could cite no fact inconsistent with the possibility.

Eloquent evidence that the contact with the gear rack did not cause the collapse of the girder comes from the photograph identified as "C" in our Petition. This exhibit is a photograph of the collapsing bascule span just before it cleared the stern of the ship, and shows that the lower part of the downstream girder of the span is still standing at its original angle of elevation up to a point about opposite the ship's bridge decks, and is broken and bent at that point. Photograph "D" shows the jackknifing upper portion of the span which pressed the lower flange down and upstream, causing it to buckle on the upstream side and tear on the downstream side. The sequence photographs dramatically depict the events.

With all this evidence before the Court, how can it be concluded that the collision of the ship's superstructure with the bascule span, illegally placed at 71 degrees instead of 82 degrees where no such collision would have been possi-

ble, could not possibly have contributed to the collapse of the span? Even assuming that all of the evidence on the subject may be considered as establishing some credible basis for the theory advanced by the Highway Department, there has not been eliminated the reasonable possibility that the second collision (i.e., the collision of the ship's superstructure with the overhanging span) could have contributed to the collapse of the span and consequent damage. If, instead of the finding that it did make as to the proximate cause of the damages, the District Court had found, upon the same evidence, that the proximate cause of the damages was not the initial impact but the second collision, could the appellate Courts have said that such a finding was clearly erroneous? We believe that the entire evidence clearly supplies a rational basis for finding that the proximate cause of the damages was the second collision and, if that is so, it must inevitably follow that the evidence requires a finding that there exists a reasonable possibility that the second collision could have contributed to the damages.

It is suggested in the brief of the Highway Department that this Court will not review a "finding of fact" which has been adopted by two lower Courts. We are not unaware that this Court has on numerous occasions expressed itself to that effect and we believe that it did so for the first time, in an admiralty case, in 1868 (The Hippodame v. Chapin, 6 Wall. 216, 18 L. Ed. 794). In 1874, six years after its decision in *The Hippodame*, this Court decided *The Pennsylvania v. Troop*, supra, and in doing so, reversed the decree of the District Court (concurred in by the Circuit Court, which held *The Pennsylvania* solely at fault), despite the adoption of a factual finding by both the lower Courts that the statutory violation of the *Troop* was not a proximate cause of the collision. The Court there examined the evidence in order to determine for

itself whether the record sustained the burden imposed upon a statutory violator of establishing that its fault could not possibly have contributed to the disaster. Exactly the same situation is here presented and we believe that this Court should correct the misapplication of the *Pennsylvania* rule by the District Court in deciding this matter and by the Court of Appeals in its affirmance.

2. The protrusion of the gear racks into the draw opening was a statutory violation.

In support of our Petition we have previously argued that the construction of the Ashley River Bridge with the gear racks protruding 18 inches from the abutments into the draw opening constituted a statutory violation. We have contended that this statutory violation results from the fact that the particular feature was not in accord with the plans approved by the Secretary of War, and that the requirements of the Rivers and Harbors Appropriation Act of March 3, 1899 (33 U. S. C., Sec. 401) specifically makes unlawful the construction of any bridge until plans for the same have been approved by the Secretary of War, and further makes unlawful any construction which deviates from the plans after approval unless the same is submitted to and approved by the Secretary of War. The Highway Department concedes that the feature did not appear upon the plans approved by the Secretary of War but contends that it was not necessary to obtain approval of this feature, although no Court decisions or statutory provisions are cited in support of its contention.

Perhaps the viewpoint of the Highway Department as to its responsibilities is well indicated by the anecdote sarcastically recited on page 4 of its brief concerning the attitude of a Turkish Pasha in regard to the liability of the people of Samos. The Highway Department seems to feel that our

claim is the same as that of the Turkish Pasha, while its bridge is likened to the Island of Samos. This comparison overlooks the legal distinction between natural and artificial obstructions in waterways. Natural obstructions in waterways require no permission for their existence while man-made obstructions exist illegally unless specifically and affirmatively allowed by the Sovereign having jurisdiction over the waterway. We think that the position of the Turkish Pasha may well have been correct if the Island of Samos had been placed by the South Carolina State Highway Department in the Ashley River without any more permission from the Secretary of War than was obtained for the construction of the gear racks protruding from the abutments into the draw opening of the Ashley River Bridge.

Other references of the Highway Department indicate its conception that approval by the statutory authority for the construction of a bridge is a matter of mere form and carries no particular consequence in relation to the bridge's construction in whatever manner the Highway Department may desire. One such indication is to be gathered from the contemptuous reference (on page 31 of the Highway Department's brief) to the drawings which were attached to the permit issued by the Secretary of War as a "sketch which constituted the so-called 'plans' required by Section 401". Another indication, typical of the Highway Department's philosophy on this subject, appears in the testimony of its Chief Bridge Engineer, W. J. Gooding (Appendix of Appellant No. 7604, p. 97) regarding the construction of the bascule spans to raise to 71 degrees, instead of 82 degrees as required by the plans approved by the Secretary of War, when he said that he would make such construction without regard to whether prior approval had been obtained and "wait for

the War Department to squawk or something that we were not doing right".

Whether one may denominate the drawings attached to the official permit as "sketches" or "plans", they nevertheless constitute the standard by which the bridge must be constructed or else exist without legal sanction. The bridgeowner is required by law to comply with these drawings and may not deviate therefrom. No legality for a structure which deviates from these plans can be implied from the failure of the War Department to "squawk". As said in our Petition, the matter of legality of the protruding gear racks depends entirely on whether the bridgeowner can show that it obtained the affirmative approval of the Secretary of War to construct the bridge with this feature included. Since it clearly appears that the bridgeowner did not represent to the Secretary of War that this particular feature of construction was desired and did not request or receive approval thereof, the conclusion is inevitable that this construction is without legality.

The effort of the Highway Department to justify its failure to obtain official sanction as required by statute for the construction of this feature of its bridge is by way of testimony of some employees of the District office to the effect that in their personal opinions the protrusion of such construction would not be considered as affecting navigation in the Ashley River. Although these witnesses agreed that there was no way for them to tell from the plans submitted by the applicant that the bridge to be constructed would have protruding gear racks, they thought that if such feature had been shown it would not have been regarded as an objectionable construction since contact with passing vessels could be avoided by fendering, but they conceded that approval of such conditions was a matter of judgment for the Secretary of War to determine.

The evidence submitted at the hearing in July, 1959, establishes that the War Department is very much concerned with many structural elements outside of the red lines. It is true, of course, that the primary concern of the War Department is that there shall be available for navigation a clear width, sufficient to meet the needs of navigation, but, in addition to this primary objective, it is equally important that ships passing through the opening shall do so in safety. (Appellants' Appendix, No. 8023, pp. 38, 39, 45, 46, 90, 91, 92, 95, 126). The provisions of the application for a permit clearly indicate the concern of the War Department with the essential features of the structure in the area of the navigational opening, since it is required that there be shown upon the plans submitted with the application the "position of piers, abutments, fenders," all of which are outside of the red lines. (Petition, p. 25a-F). It is implicit that by requiring a showing upon the plans of "those features which affect navigation" the War Department intends that there appear upon the plans whatever may constitute a hazard to the safe passage of vessels, whether within or without the red lines. (Appellants' Appendix, No. 8023, pp. 90, 95).

In this connection, Mr. Paul Snell, a Civil Engineer with 38 years of service in the Corps of Engineers, 22 years of which he headed the Permit department in a District office, expressed the view that the protruding gear feature was "hazardous to navigation" and should have been shown by the applicant on the plan submitted for approval so that the permit could either eliminate the hazard or prescribe the protection needed in respect to this potential hazard (Appellants' Appendix No. 8023, pp. 90, 92, 93, 94, 97). Regardless of whether this feature is viewed as hazardous or non-hazardous, the fact remains that it was not approved in the manner prescribed by statute and so, by the very terms of the statute, exists illegally.

The Highway Department urges that the bridge as built "faithfully implemented the permit," and cites the testimony of its design engineer witness Barstow to the effect that the contract and shop drawings made for the use of constructors of the bridge, and the construction itself, faithfully implemented the permit plans. This is so obviously contrary to fact that it hardly needs comment. The evidence is that the contract drawings provided for the raising of the bascule spans to no more than 79° 30′ and that the actual construction allowed the spans to be raised to no more than 71 degrees, whereas the permit requirements were that they be raised to 82 degrees. Not only did this variation from the permit requirements not permit the spans to be raised to the proper angle but it effectively narrowed the navigational opening to 107.3 feet as compared with the permit requirement for a clear opening of 136 feet, and obstructed the draw by overhanging the fenders by approximately 14 feet on each side. Furthermore, the contract and shop drawings showed that the gears would protrude beyond the abutment, which is a distinct variation from what is shown upon the approved plans.

If the Army Engineers made the periodic inspections of the bridge during the period of construction that the Highway Department would have this Court believe, it seems strange that no one appears to have been aware of the deviation from the permit in respect to the raising of the spans or the protrusion of the gear racks. There is no evidence of the awareness by any inspector or engineer employed by the War Department of these features of construction or of the numerous variations from the requirements of the permit, and the certification by the District Engineer to the Secretary of War, after completion of the bridge, that there had been compliance with the permit was contrary to fact, and is of no avail.

As the Court observed in the similar case of *United States* v. *Norfolk-Berkeley Bridge Corp.*, 29 F. 2d 115, 122, where a United States vessel collided with some overhanging gear racks while passing through the draw of a bridge:

> The bridge corporation does not deny that there was an overhang of the gear racks when the bridge was built in 1916, but it takes the position that this construction was approved in effect by the Secretary of War. *** The district engineer and other subordinates of the War Department had no authority to authorize a modification of the plans attached to the permit. The terms of the General Bridge Act are clear that this authority is vested in the Secretary of War and Chief of Engineers. *** If by oversight or otherwise a material departure from the general plan is approved by the district engineer or his assistants, the responsibility of the bridge owner is in no way affected.
>
> The bridge corporation further argues that certain letters which passed between its engineer and the district engineer during the early part of 1924 prove that the bridge was constructed in 1916 in accordance with the permit. The engineer of the bridge on February 1, 1924, wrote the district engineer and *** requested a statement from the War Department on the point. To this letter the district engineer replied (as was the fact) that on January 10, 1924 he had reported to the Chief of Engineers that the bridge had been completed in accordance with the approved plans. This correspondence, however, is not conclusive. In indicates quite clearly the opinion of the district engineer, *but this is of no avail since*, as has been shown, *it is not in accordance with the facts*. (Emphasis added)

If the existence of the gear rack constituted a statutory violation and if the collision of the vessel with it was the proximate cause of the damages. then the bridgeowner is at equal fault regardless of whether there was negligence in the navigation of the vessel. *The Pennsylvania v. Troop*, supra.

3. The fendering system was inadequate in design, construction and maintenance.

The Highway Department argues that the fender system was adequate as designed, constructed and maintained. The adequacy contended for is to keep a passing vessel from striking the concrete abutment. It is said that the fender system was intended to do no more than this and since, in fact, it did keep the ship from scraping the abutment, it accomplished its purposes.

The argument of the Highway Department is strangely silent with respect to the adequacy of the fendering system to fend a ship from striking the gear rack which protruded from the abutment and from collision with the overhanging bascule span. We agree that the fender did keep the ship from striking the concrete abutment, but that was only one portion of the bridge structure at the draw opening. We contend that the inadequacy of the fendering system is established by reason of the fact that it was not designed, constructed and maintained to hold a ship off of all the structure at the draw opening, and particularly those portions of the structure (i.e., the protruding gears and the overhanging span) which were erected without permission of the statutory authority.

The design, construction and maintenance of the fenders, being limited to protection of the concrete abutment alone, emphasizes what we have previously argued in this brief.

That is to say, the expert opinion is that the construction with protruding gear racks would or would not constitute a hazard to navigation, depending upon the adequacy of the fendering system which protected it, and that hence the intended construction should have been made known to the authority whose permission was required for building the bridge. If the protrusion of the gears had been made known to the Secretary of War, he might well have prescribed in the permit that there either be no protrusion or what fendering would be necessary to eliminate the hazard. Instead, the Highway Department withheld from the Secretary of War the information that he should have had in respect to the intended construction of the protruding gear rack and then designed and constructed a fendering system which did not fend against this hazard.

In respect to the maintenance of the fenders, as we stated in our Petition, the uncontradicted testimony was that the pilings were in a state of almost complete deterioration with comparatively few not completely broken off. It is said by the Highway Department that the witness Rudd, a diver, stated that he found pilings to be good, whole pilings, unbroken from the waterline down into the mud. This witness was concerned only with underwater damage in respect to the piles and gave no testimony as to the damage between the high and low water mark, which is always the area principally affected by marine life. We believe that a photograph designated "E" in the Appendix to the Petition demonstrates irrefutably the condition of the piling above the low-water line. (Defendants' Exhibit D-I, No. 3)

The Highway Department claims that the testimony of Col. L. S. LeTellier was to the effect that had the fender not served its purpose "the terrific impact of the FORT FET-

TERMAN might very well have destroyed the concrete abutment of the bridge, since the FORT FETTERMAN, because of her size and speed at the time of the impact, was exerting a potential energy in the neighborhood of sixty million foot-pounds" (Brief in opposition to Petition, pp. 24, 25). In point of fact, neither Col. LeTellier nor any other witness attempted to give the force of the impact between the hull of the vessel and the gear rack. Col. LeTellier did state that a ship of over 10,000 tons dead weight, "if it were moving at, say, eight knots," would exert "a potential energy there of sixty—around sixty million foot-pounds", but went on to say that "if it were scraping into the fender—I don't know what—I don't know what the force of that reached—but it could develop a component against those piles the magnitude of which —I don't know". (Appellees' Appendix, No. 7604, p. 227).

Obviously the assertion by this witness with respect to the energy exerted of sixty million foot-pounds refers to a headon collision between the vessel and some fixed object and has no reference to the scraping force exerted by reason of a breasting action between the hull and the fenders such as did occur. Incidentally, it is interesting to note that the Highway Department always assumes and asserts a terrific blow between the hull of the vessel and the gear rack which resulted from the scraping action, while at the same time it assumes and asserts that there was a light blow from the ship's superstructure upon the overhanging span although this collision was headon. (Defendants' Exhibits DX-4, 5, and 2, appearing as photographs "A", "B" and "C" in back of this reply brief).

In regard to our contention that the number of pilings provided in the fender system was substantially less than those shown to be required by the permit, the Highway Depart-

ment states that the number of piling depicted upon the approved plans was no more than "symbolic". We do not know how it arrives at such a conclusion except that the chief bridge engineer of the Highway Department testified that when a socalled "sketch" is made up to go with an application for construction of a bridge the Highway Department does not intend that it should be tied down to any specific number of pilings. (Appellee's Appendix, No. 7604, p. 285). Be that as it may, the plans approved by the Secretary of War, whether conceived by the Highway Department to have any significance, did depict and define the number of pilings for the fendering system, and a far lesser number than prescribed by the approved plans existed at the time of this collision. As the Court held in the *Norfolk-Berkeley Bridge* case, improper maintenance is as much a deviation from the permit as improper construction. *United States* v. *Norfolk-Berkeley Bridge Corp.*, 29 F 2d 115.

4. The failure promptly to open the draw upon signal caused the ship to lose the momentum necessary for maneuverability.

The Highway Department contends that the draw was opened in ample time to permit the ship to pass through the opening. While, of course, the draw was opened before the ship attempted the transit of the opening, she had then lost the momentum which was needed for proper maneuverability. The Highway Department makes no attempt to refute the testimony of those in charge of the vessel on this subject.

It was testified by the third mate that the ship blew for the bridge to open for the first time at approximately 0920, for the second time at 0927, and for the third time at 0933 (Appellants' Appendix No. 7604, pp. 137, 138, 139). The entries in the bell book of the vessel show the various speeds

of the vessel's engine from the time when the ship first blew to the time of the collision as follows (Appendix of Appellants No. 7604, p. 102):

> . . . 0918 half ahead. 0923 slow ahead. 0927 stop. 0931½ dead slow ahead. 0933 stop. 0933⅝ slow ahead. 0936 half ahead. 0937¼ full ahead. 0939 port side struck bridge. 0939⅝ stop.

As stated in our Petition, the loss of momentum brought about by having to slow the forward speed of the vessel on its approach to the bridge opening impaired its maneuverability and undoubtedly contributed to the collision. There is no refutation of the evidence bearing on this subject and we believe that it is inescapable that the bridgeowner should be held at fault for its statutory violation in failing to open the bridge promptly upon signal and in failing to give any responsive signal. (33 C.F.R., Sec. 203-210)

CONCLUSION

For all of the reasons mentioned by us in our Petition, as well as the reasons here discussed, we respectfully submit that the Petition for writ of certiorari should be granted.

Respectfully submitted

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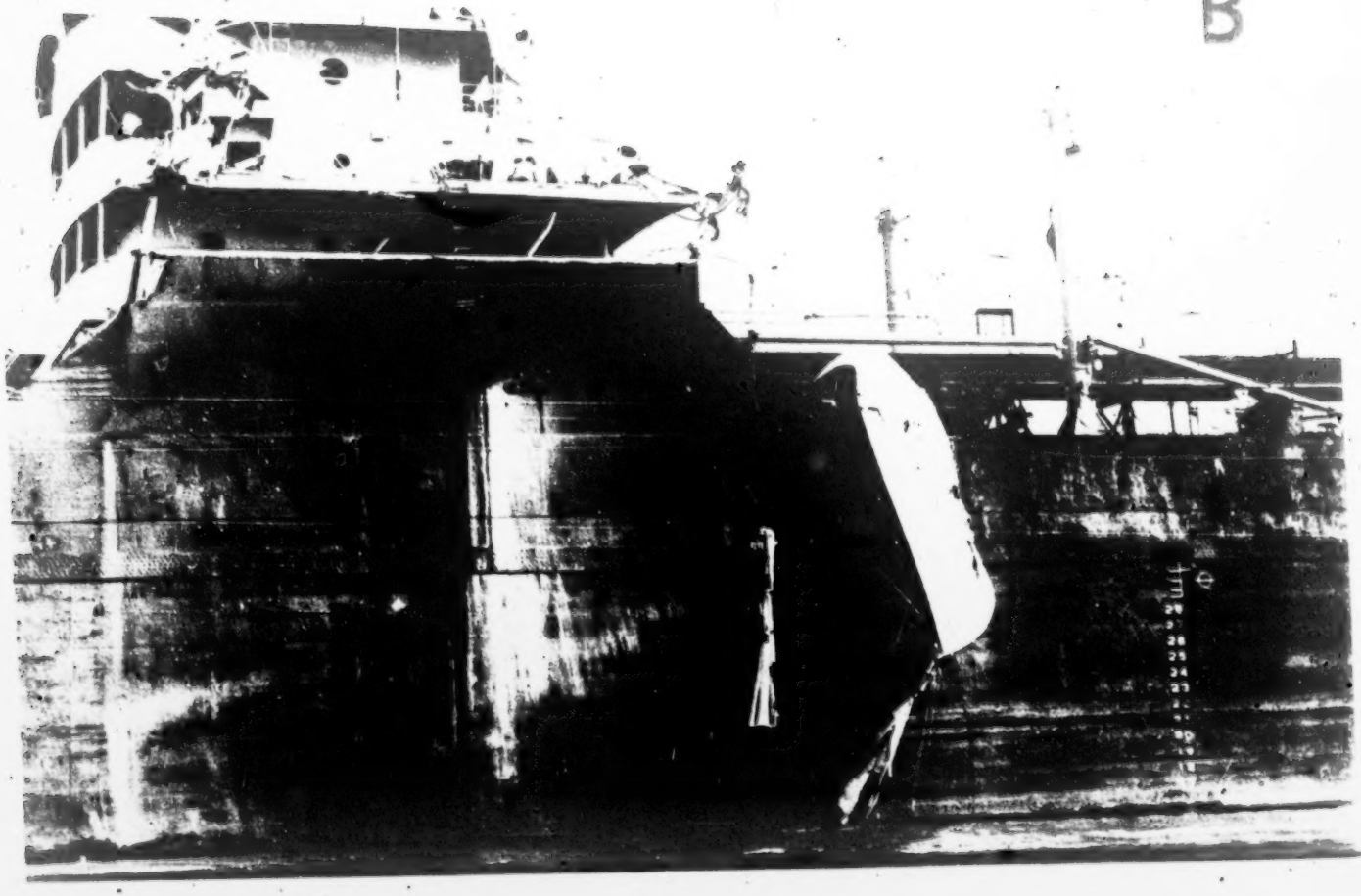
A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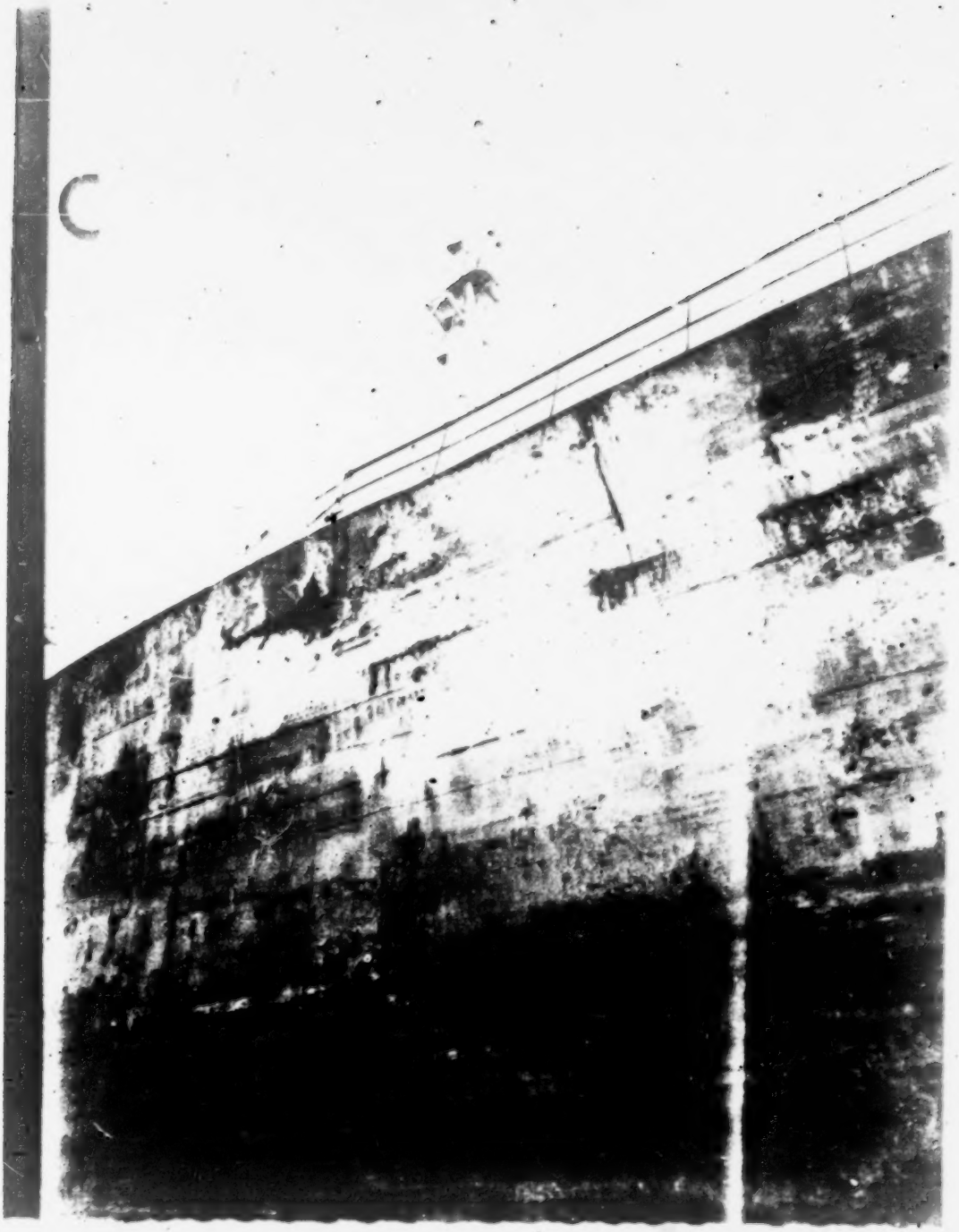

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IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Petition for Rehearing of Order Denying Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States

The Petitioners, pursuant to Rule 58 of this Court, pray that the Court reconsider its order of December 5, 1960 denying their Petition for a Writ of Certiorari, and, in order that complete justice may be done, pray that the Court rehear their application as to the need for this Court's issuance of a Writ of Certiorari. As grounds for such reconsideration and rehearing the Petitioners respectfully show:

1. The action of the Court of Appeals has deprived the

Petitioners of a fair, complete and impartial trial.

(a) The Court of Appeals has permitted a piecemeal and abridged trial of the issues.

(b) The novel procedure adopted and carried out by the Courts below was prejudicial and unfair to the Petitioners, and calls for this Court's power of supervision and correction.

II. The Courts below have erroneously decided that a portion of a bridge structure was not constructed in violation of law although such construction deviated from the plans approved by the Secretary of War.

PREFACE

Reference of the Court is respectfully craved to pages 2, 3, 4, 7 and 12 of our Petition for Writ with respect to the Court's Jurisdiction, Opinions Below, Questions Presented, Statutes involved, Statement of Case and Statement of Facts in this cause.

GROUNDS FOR REHEARING

POINT I. THE ACTION OF THE COURT OF APPEALS HAS DEPRIVED THE PETITIONERS OF A FAIR, COMPLETE AND IMPARTIAL TRIAL.

(a) The Court of Appeals has permitted a piecemeal and abridged trial of the issues.

In his decree of October 17, 1957, following the first trial, the United States District Judge for the Western District of South Carolina (sitting in the Eastern District of South Carolina) found that the vessel's improper navigation was the sole proximate cause of the damages to ship and bridge, and held the vessel solely at fault. 153 F. Supp. 359)

In its decision of November 13, 1958 (261 F. 2d 563), the Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and remanded the case for a division of damages, stating in part, as follows: (1a, 7a, 10a)

> . . . We believe that the factual situation here presented calls for the clear application of the rule as stated in *The Pennsylvania*, 86 U.S. (19 Wall. 125, to the effect that the burden rests upon the party guilty of a statutory fault to show not only that *probably* his fault did not contribute to the disaster, *but that it could not have done so.*
>
> * * * *
>
> . . . Applying these principles to the facts at hand, we do not believe that the appellee has met the required burden. While appellee suggests that the protruding gear racks were not stressed by appellant at the time of trial in the lower court, the violation existed and was apparent from the drawings. *Moreover, were we to disregard the protruding gear racks, we would arrive at a like conclusion because of the deviations from the approved plan.* To hold otherwise would require us to conclude that a vessel, passing through the bridge opening at a place it admittedly had the right to be, would sustain only minor damage to its superstructure and, in turn, cause little or no damage to the bridge.
>
> We agree with the district court in its finding that the bridge fender systems should not be expected to withstand an impact from a 10,000-ton vessel making 5 knots or more under a "Full Speed Ahead" bell, *but we do not feel that the resistance offered by the fendering system could not possibly have caused the ship to deviate to some extent, thus enabling it to avoid striking the pro-*

truding gear rack. The force of this argument leads us to the inevitable conclusion that the appellee has not carried the admittedly heavy burden of establishing that its statutory fault could not have, under the "reasonable possibility" test, contributed to the accident and resulting damages. The fact that the approved plans and specifications made no provision for tolerance as to protruding gears; that the gears did protrude a matter of 18 inches from the outer face of the abutment; that the vessel's superstructure would have collided with the uppermost portion of the raised bascule span had the ship been navigated parallel with the fender system; and that the bridge opening was substantially reduced by reason of the unlawful structure; all point convincingly to appellee's difficult position in sustaining the burden imposed by reason of these statutory faults. *From a review of the record we think it clear that appellee has not shown that the unlawful structure could not, under the "reasonable possibility" test, have contributed to the collision.* (Emphasis added)

° ° ° °

. . . Holding that the district court was in error in concluding from the facts in this case that appellee had met the burden imposed by law, and being of the opinion that the situation herein presented calls for a division of damages, the decree of the district court is

Affirmed in part, Reversed in part, and Remanded.

After granting a rehearing, the Court of Appeals in its decision of June 8, 1959 (268 F. 2d 27) set aside its direction that damages be divided, but affirmed in part, reversed in part, the decree of the lower court, and remanded the case

to the District Court for further findings. In its decision, the Court of Appeals stated in part as follows: (12a)

> . . . We had previously concluded that, under the situation presented, the damages should be divided. On rehearing we adhere to our previously expressed view that the improper navigation of the appellant vessel contributed to the resulting damage, but we find it necessary to remand the case to the district court for further proceedings, without directions to divide the damages, to the end that specific findings may be made in light of the Pennsylvania rule. *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125 L. Ed. 148.
>
> A portion of the prior opinion discusses at length the protruding gear rack, the authority for which is not disclosed on the face of the permit issued by the War Department.
>
> * * * * *
>
> . . . If such a protrusion was contemplated by the plans, it is not, of course, a deviation from the plans and specifications and there would be no statutory fault with respect to the gear racks, as the structure would be lawful to that extent. *We therefore conclude, in order that this important issue be decided in the light of all the available testimony, that on the remand the parties should have an opportunity to present further evidence on the point and that* the District Judge should make appropriate findings based on the present record and such additional evidence as the parties may present as to whether the protrusion of the gear racks was in accordance with or in violation of the permit issued by the War Department.
>
> We think it clear that the Pennsylvania rule must be applied with relation to the statutory fault existing as to

> the maximum elevation of the raised bascule spans. While we accepted the lower court's finding that the initial impact between the vessel and the bridge was at the gear rack, we do not agree on the record before us that the damage to the bascule span would not necessarily have occurred under the "reasonable possibility" test as stated in our previous opinion. The trial court, having failed to apply the Pennsylvania rule, may now consider the existing record and will undoubtedly permit further evidence on this point, as well as upon any other contended statutory fault. (Emphasis added)

In his decree of September 29, 1959, following the second trial (177 F. Supp. 76), the same District Judge again held the vessel solely at fault, finding that the protruding gear rack was not a feature affecting navigation and did not violate the Secretary of War's permit. The District Court further held that no violation of the permit could possibly have contributed to the damages, although the Court excluded and refused to consider Petitioners' evidence of such a possibility.

In its decision of May 19, 1960 (278 F. 2d 951), the Court of Appeals for the Fourth Circuit affirmed the District Court's decree, and stated in part as follows: (19a)

> . . . We do not suggest that, in applying the Pennsylvania rule, a court may not, to some extent, speculate as to what may have happened because of the existing statutory fault. Indeed, the rule itself requires such an approach. However, this is likewise a factual matter to be determined from credible evidence, and we cannot say that the District Court was clearly in error in reaching the conclusion that no material damage would have resulted if the vessel had not struck the gear rack.
>
> * * * *

> . . . The trial court concluded, after a full hearing, that the overhanging bascule span could not have contributed to the consequent damage under the peculiar circumstances of this case. Irrespective of our personal views, we cannot say that this finding is plainly erroneous, and this is so even though a portion of the vessel's superstructure would perhaps have come in contact with the overhanging bascule if the ship had proceeded through the opening without striking the gear rack.
>
> • • • •
>
> . . . We must assume that, on remand, the trial court concluded that the vessel would not have deviated and thus avoided striking the gear rack, irrespective of the condition of the fendering system on the western side.

(b) The novel procedure adopted and carried out by the Courts below was prejudicial and unfair to the Petitioners, and calls for this Court's power of supervision and correction

In the first decision of the Court of Appeals, following the first trial, the Court of Appeals made it perfectly clear, and so ruled, that *from a review of the record* there were numerous violations of the permit which could with reasonable possibility have contributed to the damages and that the South Carolina Highway Department had failed to carry the burden imposed on it by The Pennsylvania Rule. Therefore, the Court of Appeals correctly directed a division of damages. This was the proper procedure.

In *Dwyer Oil Transport Co.* v. *The Edna M. Matton*, 255 F. 2d 380, the Court of Appeals for the Second Circuit similarly reversed a District Court decree of sole liability, and directed a division of damages, stating in part as follows: (p. 382)

> . . . In the case at bar the appellant specifically requested a finding of statutory violation and joint liability against

the Corporal because of its ineffective lookout. The court's refusal so to find, in the light of his conclusions, must be taken as a determination that the statutory violation could not have played any part in the ultimate collision. We think, however, that on the record in this case such a finding would have been clearly erroneous.

* * * *

. . . For aught that appears, a proper lookout on the Corporal could thus have caused her, by reversing sooner, to avert the collision.

We can only conclude that the Corporal did *not* sustain the burden of proof which, under the Pennsylvania rule, came into play once her failure to maintain a proper lookout was established.

* * * *

. . . The decree is modified to hold the Corporal jointly at fault with the Matton.

In *States Steamship Co.* v. *Permanente Steamship Corp.*, 231 F. 2d 82, the Court of Appeals for the Ninth Circuit also reversed a District Court decree of full damages, and directed a division of damages in the following language: (p. 88)

. . . Whatever the true explanation, the Permanente Silverbow's own version leaves unanswered the reasonable doubt whether the Colorado's last-minute turn to starboard would ever have been made, had the Permanente Silverbow given any signal whatever of her just-completed turn to port.

* * * *

. . . .Accordingly the trial court's findings that "the collision was caused solely by the * * * faults of the Colorado, and that neither vessel's failure to sound sig-

nals was or could have been a cause of the collision," must be held clearly erroneous.

. . . To repeat the words of this Court in Kaseroff v. Petersen, supra, 136 F. 2d at page 186: "Both vessels being at fault, each had the burden of proving that her fault * * * could not have been one of the causes of the collision. * * * The burden was not sustained. The evidence * * * shows that each vessel's fault not only could have been, but probably was, one of the causes. We conclude that the damages should be equally divided."

In *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537, 539, Judge Learned Hand stated as follows:

. . . Ordinarily we should accept the judge's finding that the failure to set sufficient lights "did not in fact cause the accident," but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a "statutory rule intended to prevent collisions * * * the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

* * * *

. . . It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6000 feet, the "Lion" would nevertheless have failed to act in season, especially when it needed so little added time to clear the "icebreaker".

The decree will be modified to award the libellant only half damages.

In none of these cases was the statutory violator given a second bite at the cherry and the chance to create a new record. However, in its decree of June 8, 1959 the Court of Appeals in the case at bar, after rehearing, remanded the case to the District Judge for further findings on the issue of whether the *protruding gear rack* constituted a violation of law, notwithstanding that the Court of Appeals had previously held that there were other clear violations of the statutory permit, and adhered to its ruling that *on the record* the bridge-owner had failed to bear its statutory burden under the Pennsylvania Rule.

By what authority did the Court of Appeals remand this case to the District Court to query whether the protruding gear rack was violative of the permit, when the Court of Appeals had held and reaffirmed its own holding that there were other bases on which to direct a division of damages, namely that irrespective of the gear racks, there were violations of law which could reasonably on the record have contributed to the disaster?

If the bridgeowner had failed to sustain its burden under the Pennsylvania Rule as the Court of Appeals held, why was it necessary to remand the case on the issue of the gear rack? When the Court of Appeals did so, it gave the statutory violator two bites at the cherry, and the opportunity to explain away on a new record its failures in proof on the first record.

We submit that not only was the South Carolina Highway Department thus allowed to try the case in piecemeal fashion, so that it could start over and mend its bridges with the "further evidence" permitted by the Court of Appeals in its second decision but the shipowner was deprived of the corresponding right to start over and adduce other evidence as to the relationship of the various permit violations to the dis-

aster. We repeat that the District Court excluded and refused to consider any evidence bearing on a possible relationship, except with respect to the gear rack.

The procedure adopted by the Court of Appeals and consummated by the District Court allowed the South Carolina Highway Department to reopen the case on the unnecessary issue concerning the gear rack violation, and to thereby retry issues which the Court of Appeals had adjudicated against the Highway Department, namely its failure to bear the burden of the Pennsylvania Rule. The result was to give the Highway Department a complete retrial on all issues which had been adjudicated against it, and at the same time restrict the vessel to an abridged and incomplete trial, limited to merely contesting any showing thereafter made by the Highway Department on the retrial.

We submit that this novel procedure, whereby the Respondent was permitted to reopen issues adversely determined against it, and whereby the Petitioners were foreclosed from a complete inquiry into and determination of the issues in the cause, was prejudicial and unfair to the Petitioners.

We earnestly submit that justice and fair play requires that this Court reconsider its order and rehear the matter, to the end that a writ of certiorari be granted.

POINT II. THE COURTS BELOW HAVE ERRONEOUSLY DECIDED THAT A PORTION OF A BRIDGE STRUCTURE WAS NOT CONSTRUCTED IN VIOLATION OF LAW ALTHOUGH SUCH CONSTRUCTION DEVIATED FROM THE PLANS APPROVED BY THE SECRETARY OF WAR.

In our Petition for Writ of Certiorari we presented points and argument revolving around a number of questions set

forth on pages 3 and 4 of said Petiton. Since the Court has denied our Petition without opinion, we are at a considerable disadvantage in evaluating the Courts reasoning or its reasons therefor. Accordingly, we are unable to focus the Court's attention to any misconception or fallacy on its part which may have been instrumental in its refusa of the petition.

Nevertheless, we must accept tha the Court gave due and sound consideration to all points preented by us. Accordingly, we can only rationalize that the Court's denial of our petition with respect to Questions 1, 2, 3, 4 5 and 10, 11 on pages 3 and 4 of our Petition for a Writ, a meaning that this Court has decided to leave the resolution of such questions to the Two Courts below.

However, we are at a loss to comprehend the Court's refusal to review the disposition of Questions 6, 7, 8 and 9, especially since no Court in this case has yet to even mention, much less refute the numerous authorities cited under Point 2 (on page 34) of our Petition for a Wit. In view of our conscientious belief that such decisions are authoritative and decisive of such questions in this case, we earnestly and respectfully request this Court to reconsider the same as additional grounds (under Point II hereof) for a rehearing.

CONCLUSION

It seems inconceivable to us that liability for full damages can be justly imposed upon the Petitioners in this cause. For all the foregoing reasons, the Petitioners respectfully urge that justice and fairness requir the Court to reconsider its

order denying the writ, and to rehear the matter to the end that a writ of certiorari be granted.

Wherefore, the Petitioners respectfully pray that this Court grant a rehearing and reconsideration of its order.

Respectfully submitted,

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Attorney for Petitioners

OF COUNSEL—
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Charleston, South Carolina

CERTIFICATE

I, D. A. Brockinton, Jr., Counsel for the Petitioners herein, hereby certify that the foregoing Petition is presented in good faith and not for delay. I do hereby also certify that the said Petition is restricted to the grounds hereinabove specified.

D. A. BROCKINTON, Jr.